TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1929~~ 1930

No. ~~98~~ 6

WILLIAM J. STRATTON, SECRETARY OF STATE OF THE STATE OF ILLINOIS, APPELLANT,

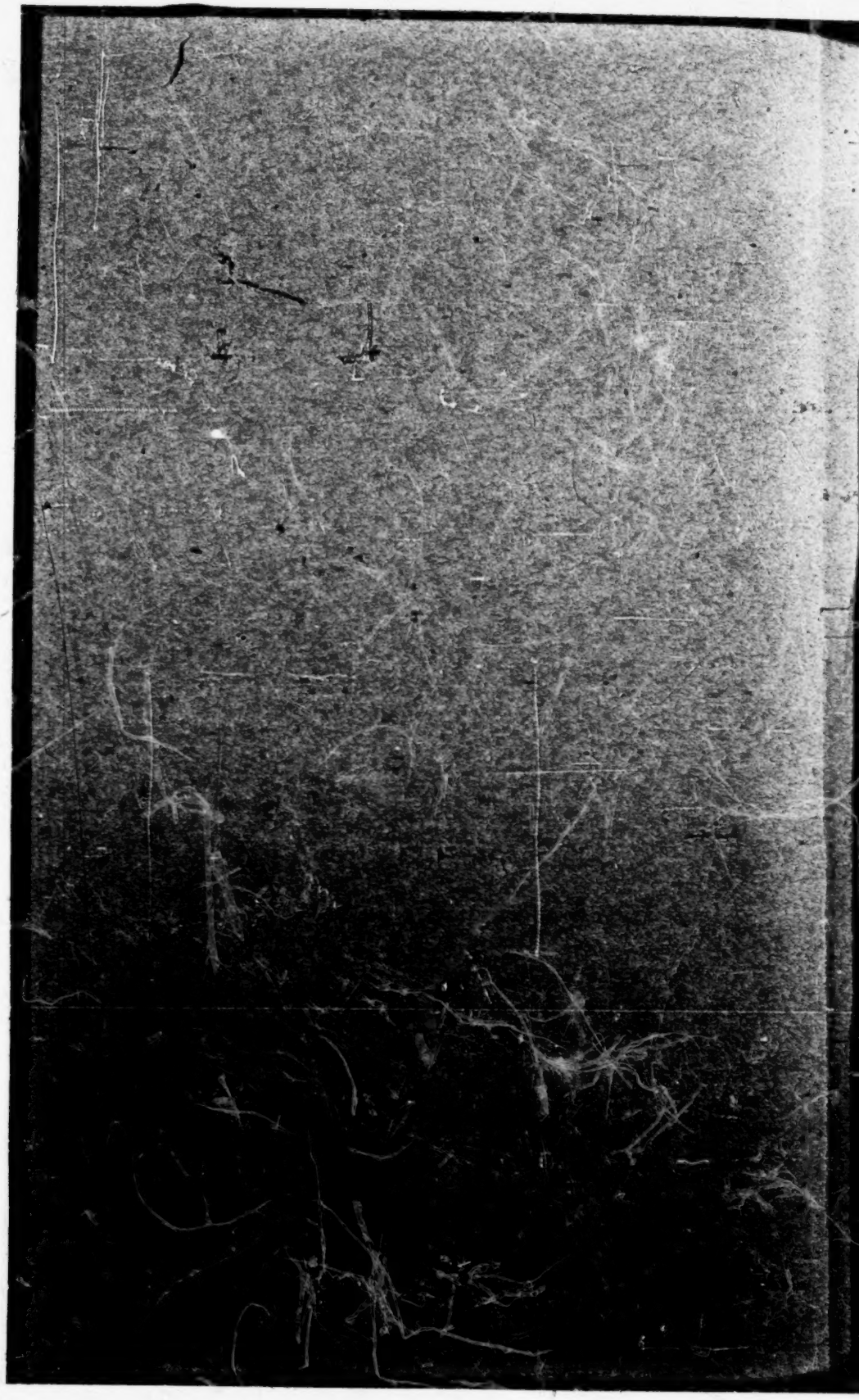
vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FILED MAY 20, 1929

(34,223)



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2 Pleas in the district court of the United States of America, within and for the Eastern Division of the Southern District of Illinois, held at the City of Springfield, in said division and district, before the Honorable Louis FitzHenry, Judge of said court on Thursday, the seventh day of June, in the year of our Lord one thousand nine hundred and twenty-eight and of the Independence of the United States of America, the one hundred and fifty-second year. Attest:

Plaet

S. T. BURNETT
Clerk.

July 21, 1927. 3 IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Illionis,

Southern Division.

St. Louis Southwestern Railway Company, a corporation *vs.* Louis L. Emmerson, Secretary of State of the State of Illinois.	No. 800. In Equity.

Be it Remembered that heretofore to wit: on the 21st day of July in the year of our Lord one thousand nine hundred and twenty-seven, that being one of the days of the June Term, A. D. 1927, of the district court of the United States for the Southern Division of the Southern District of Illinois, the plaintiff herein by its solicitor filed in the office of the clerk of said court, a certain bill of complaint, which said bill of complaint was and is in the words and figures, following, to wit:

4 * * (Caption) * *

BILL FOR INJUNCTION.

To the Honorable Judges of Said Court, in Chancery Sitting:

Your orator, the St. Louis Southwestern Railway Company, respectfully represents to your Honors that it is a corporation organized under the laws of the State of Missouri, and is duly authorized to do business in the State of Illinois, and is a citizen and resident of the State of Missouri; that it has property located in the State of Illinois and is doing business in said State; that it is organized as a corporation with an authorized capital stock of par value of $130,000,000.00, consisting of 1,300,000 shares of a par value of $100.00 each; that of said authorized capital stock, $36,249,750.00, par value, has been actually issued and is outstanding, and that the balance thereof is unissued; that the amount of said capital stock authorized, and the amount which has been issued, appears by copy of its charter now on file in the office of the Secretary of State of the State of Illinois, and on the annual report for the year 1927, filed by your orator with Louis L. Emmerson, Secretary of State of the State of Illinois, the

defendant herein, who is a citizen and resident of the State of Illinois.

Your orator represents that it is engaged in intrastate and interstate transportation of freight, passengers, mail and baggage, as a common carrier, and as such is subject to the Interstate Commerce Act and Transportation Act of the United States of America; that your orator is engaged in intrastate and interstate commerce in and between the
5 States of Missouri, Illinois, Arkansas, Louisiana, Texas and other states; that the total vaue of the property of your orator engaged in such business is, as set forth in said report to the defendant, Louis L. Emmerson, the sum of $76,793,697.79; that the total business of your orator transacted everywhere during the year 1926 was $18,201,955.32; the total length of railroad track owned by your orator in all states was 940.58 miles; that the total value of the property of your orator in Illinois, was $786,196.00; that the total business transacted by your orator at or from places of business in the State of Illinois, during the year 1926, was $2,868.36; all of which was shown by the annual report of your orator filed with the defendant, the Honorable Louis L. Emmerson, Secretary of State of the State of Illinois, under the provisions of Section 105 of the General Corporation Act of the State of Illinois, which said report was filed for the purpose, and the data therefrom used by said defendant for the computation and assessment of franchise tax for the year beginning July 1, 1927, and ending June 30, 1928, and a copy of which said annual report is attached hereto and marked Exhibit "A."

Your orator further shows to your Honor that the franchise tax provided in paragraph 105 of the General Corporation Act of Illinois is based on the proportion which the property located and business done in Illinois bears to the property located and business done in all states; that by paragraph 107 of said Act, a minimum tax is provided for corporations owning no property in the State of Illionis, and doing no business in said State, which said minimum tax or fees, is based on the issued capital stock, and by which, a corporation having an issued capital stock in excess of $10,000,000.00 is required to pay an annual fee of $1000.00.

Your orator further shows to the Court that by further provision of paragraph 105 of said Corporation Act, it is provided that in no event shall the amount of the license fee or franchise tax of a foreign corporation be less than
6 that required by the Act of a corporation having no

tangible property or business in the State of Illinois.

Your orator further shows that if said franchise tax or franchise license fee be computed according to the property owned, business done and mileage of your orator in Illinois, and in other States, that it would owe the State of Illinois, a tax of 5c on each $100.00 of .00746% of its issued and outstanding capital stock, amounting to One Hundred and Thirty-five and 21/100 ($135.21) Dollars, as such franchise tax, for the year 1927.

Your orator further shows to the Court that the defendant, Louis L. Emmerson has, over the objection and protest of this defendant, assessed said tax at the sum of $1000.00; that on first being advised of said assessment, your orator notified the defendant, Louis L. Emmerson, that it objected to the amount of said tax as fixed by him, and requested a hearing before him in connection therewith, and that said Louis L. Emmerson neglected, failed and refused to fix a time and place for such hearing; and that the Agent of your orator called at the office of said Louis L. Emmerson and explained fully to said defendant's assistant in charge of the Assessment of Franchise Taxes, the contention of your orator by virtue of which a franchise tax for the year 1927, not in excess of One Hundred and Thirty-five and 21/100 ($135.21) Dollars, was due, and that said Assistant, on behalf of and with the authority of said Louis L. Emmerson, insisted that a franchise tax of $1000.00 was due.

Your orator further shows to your Honors that it has tendered to the defendant, Louis L. Emmerson, said sum of One Hundred and Thirty-five and 21/100 ($135.21) Dollars, in payment of the franchise tax due from it to the State of Illinois, for the year July 1, 1926, to June 30, 1927, and that its tender was refused; and that it is ready and willing to pay said amount to said Louis L. Emmerson, at any time he may choose to accept same.

7 Your orator attaches hereto as its Exhibit "B" and by reference makes a part hereof, those portions of the said General Corporation Act of Illinois, which are pertinent to the issues in this suit.

Your orator further shows to your Honor that the defendant, Louis L. Emmerson, as Secretary of State of the State of Illinois, claims that under Section 107 of said Act, a minimum Franchise Tax can be lawfully collected from a foreign corporation, based on the total amount of its issued capital stock; while your orator denies that the State of Illinois can lawfully provide a minimum tax, based on the total

issued capital stock of a foreign corporation, where said foreign corporation has property in and does business in Illinois; as to do so would place an unreasonable burden on and discriminate against Interstate Commerce and deny your orator the equal protection of the law, respectively, in violation of the rights of your orator under paragraph 3 of Section 8 of Article 1, and Section 1 of the Fourteenth Amendment of the Constitution of the United States of America.

Your orator further shows to your Honors that the defendant, Louis L. Emmerson, as Secretary of State of the State of Illinois, also claims that where the franchise tax due from a foreign corporation, as computed under the provisions of Section 105 of said Act, amounts to less than the minimum franchise tax prescribed by Section 107 of said Act; that the said minimum tax can lawfully be collected from a foreign corporation, based on the total issued capital stock of said corporation, irrespective of the amount of property owned and business done by it in the State of Illinois, and that pursuant to the provisions of Section 107 of said defendant Louis L. Emmerson, Secretary of State of the State of Illinois, has notified your orator that he had, under said Section 107, assessed a franchise tax of $1000.00 against it.

8 Your orator further shows that there is no method provided by the laws of the State of Illinois for an appeal from the fixing of said tax, as aforesaid, by the defendant, Louis L. Emmerson, Secretary of State of the State of Illinois, and that there is no provision in said law whereby the fixing of said tax alleged to be due from your orator, under Sections 105 and 107 of the General Corporation Act of Illinois, by reason of the amount of its issued capital stock, may be reviewed by a Court. Your orator further shows that by further provisions of said General Corporation Act it is made the duty of the defendant, Louis L. Emmerson, on the failure of any corporation to pay the franchise taxes assessed by him, if a foreign corporation, to forfeit the right of such corporation to do business in the State of Illinois, and to make illegal and unlawful, under the laws of the State of Iliinois, any business contract made by your orator in said State, and to inforce divers penalties, including criminal prosecution, against your orator, its officers and employees, on the ground that it has failed to comply with said General Corporation Act, and is unlawfully doing business in Illinois.

Your orator further represents that this is a suit in equity, brought by it to restrain the inforcement, operation and execution of the Statute of the State of Illinois, known as the

General Corporation Act, and particularly the portions, (Section 107) thereof, providing for the payment of a minimum franchise tax of $1000.00, based solely on the total issued capital of your orator, as a condition for maintaining its authority to do business in the State of Illinois, by restraining an officer of said State, Louis L. Emmerson, Secretary of State, who is a citizen and resident of the State of Illinois from inforcing the provisions of said Statute against your orator, who is a citizen and resident of the State of Missouri, on the ground that said Statute is unconstitutional as applied to your orator, under the Constitution of the United States of America; and that this suit is brought to prevent said
9 defendant, under color of said Illinois Corporation Act, from depriving it of privileges and immunities secured by the Constitution of the United States; and your orator further shows that this suit is brought to prevent the defendants from depriving it, under color of said Section 107 of the General Corporation Act of Illinois, of rights, privileges and immunities secured to it by the Constitution of the United States; further, that this is a suit of a civil nature, being a bill in Equity, filed by the plaintiff, a citizen and resident of the State of Missouri, against the defendant, a citizen and resident of the State of Illinois, to enjoin the defendant from enforcing or undertaking to enforce against the plaintiff, certain forfeitures and penalties provided by a Statute of the State of Illinois, account failure to pay the annual License fee or Franchise Tax; the matter in controversy exceeds, exclusive of interest and costs, the sum of $3000.00 in this, that the defendant seeks to enforce the payment by plaintiff of the sum of $1000.00 together with an additional penalty of 5% per month after August 1, 1927; which tax and penalties is made a first and prior lien upon the property of plaintiff in the State of Illinois; that the authority of plaintiff to do and transact business in Illinois is subject to immediate revocation by the defendant, thereby making it unlawful for the plaintiff to transact any business in Illinois, which would result in a loss to revenue to the plaintiff of at least $2500.00; or if plaintiff transacted such business without such authority, it would be liable to a penalty of not less than $250.00, nor more than $1000.00 for each item of business so transacted by it, which penalties would aggregate at least $5000.00; further, that to revoke the authority of plaintiff to do business in the State of Illinois, would damage plaintiff in a large sum, to-wit, $5000.00 or more.

10 Your orator further represents that said Section 107

of the General Corporation Act of Illinois, as applied to your orator by the defendant, Louis L. Emmerson, is illegal and unconstitutional in that such application unreasonably interferes with and directly burdens Commerce between the different states in violation of Section 10 of Article I of the Constitution of the United States; and in that it deprives your orator, a citizen of the State of Missouri, of privileges and immunities enjoyed in Illinois by the citizens of other states, in violation of Section 2 of Article IV of the Constitution of the United States; in that, it impairs the obligation of the contract between your orator and the State of Illinois, in violation of Section 10 of Article I of the Constitution of the United States; in that it abridges the privileges and immunities of your orator, a citizen of the State of Missouri, discriminating against it in favor of other corporations similarly situated as to property owned and business done in Illinois, and deprives your orator of its property without due process of law and denies your orator of the equal protection of the law, all in violation of the XIV Amendment to the Constitution of the United States; in that such application by said defendant, imposes a Franchise Tax based not upon the proportion of issued capital stock of your orator, represented by property owned and business done in Illinois, but is based upon an arbitrary minimum franchise tax determined by the total issued capital stock or your orator, which, when applied, results in a tax on your orator, larger than the tax imposed on like business and property within the State of Illinois.

Your orator further shows to your Honors that because of the failure and refusal of your orator to pay said franchise tax as assessed against it, said defendant threatens, intends to and will take steps to revoke and terminate the authority of your orator to do business in the State of Illinois; and institute proceedings to collect said tax and to inforce the penalties provided by said General Corporation Act
11 against your orator, its officers and employees, and that by reason of the duties and powers placed upon the defendant, in and for the collection of said tax and in the enforcement of said penalties, your orator is threatened with great and irreparable injury for which it cannot be adequately compensated at law, and has no adequate remedy at law.

And your orator shows unto your Honors that it cannot obtain relief or protection elsewhere than from your Honors, through the exercise of a writ of injunction to restrain said unlawful acts on the part of the defendant.

And in order that your orator, its officers, employees, and property may be protected against the unlawful and unjustifiable threatened acts and actions of the defendant, your orator respectfully prays:

1. That process of subpoena issue herein, directed to the defendant, Louis L. Emmerson, as Secretary of State of the State of Illinois, directing him to appear and answer the allegations herein contained, but not under oath, answer under oath being hereby expressly waived.

2. That an injunction issue herein, perpetually enjoining the defendant, Louis L. Emmerson, Secretary of State of the State of Illinois, and all successors, employees, attorneys, agents and all persons acting for and under his instructions, from in any form or manner whatsoever assessing against your orator any franchise or license tax whatsoever under the provisions of Section 107 of the General Corporation Act of the State of Illinois, for the year beginning July 1, 1927 and ending June 30, 1928, in excess of the amount of $135.21, or from hereafter at any time assessing any franchise tax against your orator, based on the minimum scale fixed by Section 107 of said Act.

3. That an injunction issue herein, perpetually enjoining the defendant, Louis L. Emmerson, as Secretary of State of the State of Illinois, his successors, empolyees, clerks, agents, attorneys, and all persons acting for or under his instructions, from in any manner whatsoever revoking or taking steps to revoke the certificate of authority of your orator to do business within the State of Illinois, because or on account of the refusal of your orator to pay the Franchise Tax of $1000.00, as aforesaid, or any part thereof in excess of $135.21 assessed by him against your orator.

4. That an injunction issue herein, perpetually enjoining the said defendant, Louis L. Emmerson, as Secretary of State of Illinois, his successors, employees, attorneys, agents and all persons acting for or under his instruction, from hindering or forbidding your orator to transact business in the State of Illinois, or from instituting any proceedings or filing any complaint, either at law or in equity, or in any manner taking any steps whatsoever to inforce any of the penalties, forfeitures or prohibitions against your orator, its officers and employees, on account of the refusal of your orator to pay said franchise tax of $1000.00, aforesaid, or any part thereof, in excess of $135.21, as assessed against it.

5. That a restraining order or a preliminary injunction be issued without delay, directed to Louis L. Emmerson, as

Secretary of State of the State of Illinois, enjoining and restraining him as heretofore herein prayed for.

And for such other and further relief as may appear to be just and reasonable.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY
By H. L. BROWNING,
JOSIAH WHITNEL,
Solicitors for Complainant.

J. R. TURNEY.
Counsel for Complainant.

13 State of Missouri, } ss.
City of St. Louis. }

W. A. CONAWAY, first being duly sworn, on oath states, that he is the Tax Agent for the complainant herein; that he has read the foregoing bill of complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters, he believes it to be true. That the reason why this verification is not made by the complainant in person, is, because complainant is a corporation and that this affiant is an officer thereof, viz., the Tax Agent.

W. A. CONAWAY.

Subscribed and sworn to before me this 5th day of July, A. D. 1927.

RAY K. RAMEY,
Notary Public.

(Seal)

My Commission expires Feb. 6, 1931.

Endorsed: Filed Jul. 21, 1927, S. T. Burnett, Clerk.

14 EXHIBIT "A".

Notice—Unless this report is filed prior to March first 10% must be added to the amount of franchise taxes otherwise due, and corporation is also subject to a fine not to exceed $1000.00. Only one copy of report is required to be forwarded to Secretary of State. See that the report is properly executed and corporate and notarial seals affixed before mailing, as failure to do so may necessitate the return of the report and subject the corporation to the above penalties.

Annual Report.

(Use Typewriter in the Execution of This Report)

To Louis L. Emmerson,

Secretary of State of the State of Illinois:

Report of St. Louis Southwestern Railway Company, organized under the laws of the State of Missouri as required under an Act entitled, "An Act in relation to corporations, for pecuniary profit," approved June 28, 1919, in force July 1, 1919, and all acts amendatory thereof.

1. State your name and official position with the corporation. (Whether president, vice-president, secretary, assistant secretary, treasurer, receiver, assignee or trustee.)

W. A. Conaway, Tax Agent.

2. The location of the principal business office of the corporation in the State of Illinois is at No. 505-511 First Nat'l. Bank Bldg., in the City of East St. Louis, County of St. Clair, and the names and residences of the officers and directors of said corporation are as follows:

Names of Officers and Directors.

	Office	Residence	
Name	Number and Street	City	State.
Daniel Upthegrove	President	St. Louis,	Mo.
Paul J. Longua	Secretary	New York,	N. Y.
C. Messick	Treasurer	St. Louis,	Mo.
Edwin Gould	Director	New York,	N. Y.
Charles Hayden	Director	New York,	N. Y.
L. F. Loree	Director	New York,	N. Y.
Winslow S. Pierce	Director	New York,	N. Y.
Paul Rosenthal	Director	"	" "
E. Roland Harriman	Director	"	" "
Daniel Upthegrove	Director	St. Louis,	Mo.
Carl F. G. Meyer	Director	"	" "
F. W. Green	Director	"	" "

Notice—Must give officers and show management of corporation is vested in at leasts three Directors.

3. Has the corporation acquired title to any real estate in securing any debt or liability due it? Ans. No.

4. Give a description of such property, if any has been acquired, and the date of the acquisition and disposal of such property.

None.

5. Has the corporation entered into any illegal pool, trust, agreement, combination, confederation or understanding in restraint of trade in contravention of any Act of this State concerning such matters?

Ans. No.

6. State the amount of Authorized Capital Stock of corporation.

Authorized is $130,000,000.

Issued and outstanding is $36,249,750.00.

Shares of no par value.

No. None.

When a corporation has shares of no par value such shares must be reported separately.

*7. Does the corporation wish to pay a franchise tax upon its entire authorized capital stock?

Ans. No.

*8. In the event that the corporation is assessed a franchise tax upon its entire authorized capitalization, will it be paid promptly?

Ans. .....

Notice.

The information on this perforated rider is for compiling certified list of corporations and must be answered specifically and accurately.

Exact corporate name is St. Louis Southwestern Railway Company Address. St. Louis, Missouri.

Authorized Capital Stock Authorized is $130,000,000.00.

Issued and outstanding is $36,249,750.00.

Number of shares of no par value None.

President Daniel Upthegrove, St. Louis, Missouri.

Secretary Paul J. Longua, New York, N. Y.

9. State briefly the nature of business in which the corporation is actively engaged under its charter at the present time.

State and Interstate transportation of freight, passengers, mail, express and baggage.

10. Give the total value of all the property of the corporation everywhere, specifying:

16 (a) Value of patent rights, licenses, trade-marks, secret processes, copyrights, good will, contracts, or choses in action: Ans. $ None.

(b) Merchandise, raw materials and goods in process of manufacture; Ans. $ None.

(c) Book accounts and notes: Ans. $433,713.62.

(d) Machinery and real estate; Ans. Inc. in road & Equipment. $.....

(e) Stock in other corporations and securities; Ans. $10,740,691.92.

(f) Furniture, fixtures, stationery; Ans. Inc. in road & equipment. $.....

(g) Cash in bank; Ans. $1,583,502.11.

(h) Kinds and amounts of other property, specifying in detail; Ans. $.....

Road & equipment $76,793,697.79.

11. Give the total value of all the property of the corporation located in Illinois, specifying.

(a) Value of the patent rights, trade-marks, secret processes, copyrights, good will, contracts or choses in action; Ans. $ None.

(b) Merchandise, raw materials and goods in process of manufacture; Ans $ None.

(c) Book accounts and notes; Ans. $ None.

(d) Machinery and real estate; Ans. None.

(e) Stock in other corporations and securities; Ans. $15,000.00.

(f) Furniture, fixtures, stationery; Ans. None.

(g) Cash in Bank; Ans. $ None.

(h) Kinds and amounts of other property, specifying in detail; Ans. $.....

Illinois proportion of rolling stock $786,196.00.

12. Give the location of the principal places of business of the corporation in each State, and the amount of business transacted through each, last year, Various stations along line in States of Missouri, Arkansas and Louisiana.

13. State the total business of the corporation transacted everywhere during the past year.

Ans. $18,201,955.32.

17 14. State the total business of the corporation for the past year transacted by it at or from places of business in the State of Illinois.

Ans. $2,868.36.

15. In case of a telegraph, telephone, cable, railroad, or

pipe line company, state the total length of such telegraph, telephone, cable, railroad or pipe line company, wherever located.

940.58.

16. State the length of such telegraph, telephone, cable, railroad, or pipe line company actually located in Illinois. None.

17. From what office are the affairs of the corporation managed? Ans. Daniel Upthegrove, President, Buder Bldg., St. Louis, Mo.

18. To what office or offices are all contracts with the corporation forwarded for final acceptance? Ans. Same as #17.

19. Is the corporation actually transacting business at the present time in the State where it was incorporated? Ans. Yes.

20. At what office or offices are directors and stockholders meetings held?

Ans. Buder Bldg., St. Louis, Mo.

In Witness Whereof, I have hereunto set my hand and caused the seal of said corporation to be affixed this ..... day of February, A. D. 1927.

(Affix Corporate Seal Here)

.....

(*President, Vice-President, Secretary, Assistant Secretary, Treasurer, Assignee, Receiver or Trustee*)

Tax Agent.

State of Missouri }
City of St. Louis } ss.

I, W. A. Conaway, being duly sworn, declare on oath that I am Tax Agent of the corporation mentioned in the foregoing report, and that all the statements therein made are true.

.....

Subscribed and sworn to before me this ..... day of February, A. D. 1927.

.....

(Notarial Seal)

Notary Public.

18 *Corporations having all their tangible property and business in this State are required under the Statute to pay upon their entire authorized capital stock and should

answer paragraphs 7 and 8 in the affirmative, as this will relieve them of the expense and trouble of giving the information called for in paragraphs 10 to 20 inclusive, which would be of no benefit to either the corporation or the State. Other corporations should give the detailed information called for in paragraphs 10 to 20 inclusive, in order that the Secretary of State may be able to ascertain the correct amount of franchise tax and initial fees due from them.

The State of Illinois is entitled to all business transacted by a corporation at or from a place of business in Illinois. The point from which or to which the goods may be shipped is immaterial as the Supreme Court of the United States has repeatedly held that where the business is merely taken as an index to arrive at a lawful tax, such computation is not in contravention of the commerce clause of the Constitution of the United States.

§ 102. * * * The Secretary of State shall on or before the 15th day of January of each year forward to each corporation of record in his office a copy of the forms to be used in making the report specified in this Act, but the failure to send or to receive such forms shall not relieve the corporation from the duty of making such report.

§ 151. If any officer of a corporation required by this Act to make a report under oath to the Secretary of State, shall in such report wilfully and knowingly make any false statement, he shall be guilty of perjury.

§ 153. Any corporation failing to file its annual report within the time required by this Act shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding one thousand dollars.

19 EXHIBIT "B".

55th G. A. Senate Bill No. 330 In House. 1927.

1 Reported from Senate May 3, 1927.

2 Read by title ordered printed and to a first reading.

A Bill.

For an Act to amend Sections 4, 28, 80, 92, 96, 97, 101, 105, 106, 107, 112 and 129
of an Act entitled "An Act in relation to corporations for pecuniary profit," approved June 28, 1919; in force July 1, 1919.

Be it enacted by the People of the State of Illinois, represented in the
General Assembly:

Section 1. That Sections 4, 28, 80, 92, 96, 97, 101, 105, 106, 107, 112 and 129
of an Act entitled "An Act in relation to corporations for pecuniary profit,"
approved June 28, 1919; in force July 1, 1919, be amended to read as follows:

Sec. 4. Whenever three or more adult persons, citizens of the United
States of America, at least one of whom shall be a citizen of this State, shall
desire to form a corporation under this Act, they shall sign, acknowledge and
verify the facts set up therein under oath before some officer, competent to
take acknowledgment of deeds, a statement of incorporation setting forth the
following:

(1) The names and postoffice addresses, giving town or city, street and
number of the incorporators;

(2) The name of the proposed corporation;

(3) A clear and definite statement of the object or objects for which it is
formed;

(4) The period of duration;

(5) The location of its principal office in this State, giving town, or city,
street and number, if any;

(6) The number of shares into which the capital stock is to be divided,
whether all or part of the same shall have a par value, and if so the par value
thereof, which shall not be less than five dollars, nor more than one hundred
dollars, per share, and whether all or part of the same shall have no par value,
and if there is to be more than one class of stock created, a description of the
different classes, the number of shares in each class, and the relative rights,
20 interests and preferences each class shall represent;

(7) The names and addresses giving town or city, street and number of the original subscribers to the capital stock, and the amount subscribed and amount paid by each;

(8) The total amount of authorized capital stock having a par value, and the total number of shares of no par value.

(9) The amount of such stock which it is proposed to issue at once and the consideration to be received for such stock which shall not be less than one thousand dollars, all of which must be subscribed;

(10) The payment of at least one-half of the consideration for the capital stock, which it is proposed to issue at once, with a description of the nature and value of property, if any, paid for such capital stock;

(11) The number, names and postoffice addresses of the directors by street and number, at least one of whom shall be a resident of this State, and the term for which elected;

(12) In the case of a building corporation, a specific and definite description of the site for such building;

(13) Any other provisions, not inconsistent with law, for the regulation of the business and the conduct of the affairs of the corporation, and any provisions creating, defining, limiting and regulating the powers of the corporation, the directors and the stockholders or any class or classes of stockholders. Such statement shall be filed in duplicate in the office of the Secretary of State on forms prescribed and furnished by the Secretary of State.

Sec. 28. Whenever stock, not previously reported to the Secretary of State as issued, has been issued within the authorized limit fixed by an approved statement of incorporation or certificate of increase in capital stock of a do-

mestic or foreign corporation, including railroads, a statement subscribed and sworn to by the president or vice president, and attested by the secretary or by an assistant secretary, or other officer in case of a foreign corporation, shall be filed in the office of the Secretary of State within thirty days after the issuance of such additional stock pursuant to authorization thereof by the board of directors, which statement shall set forth:

(1) The total amount of the capital stock authorized by the articles of incorporation.

(2) A statement of the additional stock issued since the issuance of certificate of incorporation, the last certificate of increase in capital stock, or the filing of the last statement, and the manner in which it is paid up, with a description and valuation of property, if any, received in payment of such stock and that of the capital stock then issued at least one-half has been paid in, in money or property. Upon receipt of such statement the Secretary of State shall examine the same and if it is in conformity with the provisions of this Act and is accompanied by the fees hereinafter required, he shall endorse thereon the word "filed." No issuance of stock subsequent to the granting of license or certificate of incorporation or increase in capital stock shall be lawful, until the statement required by this section shall have been filed in the office of the Secretary of State and the fees hereinafter required have been paid to him, and the person to whom such stock was issued may recover from the corporation the amount paid thereon together with interest and his reasonable attorney fees.

Promissory notes shall not be accepted in payment or part payment of

stock issued in pursuance of any of the provisions of this Act.

Sec. 80. Each foreign corporation organized for pecuniary profit (except banking, insurance, building and loan and surety companies) not now licensed to do business in this State, shall, before it transacts any business or maintains an office in this State, procure a certificate of authority therefor from the Secretary of State. No certificate shall issue to any foreign corporation authorizing it to transact business in this State until the same amount is paid on each share of stock issued or to be issued as is required by like corporations organized under the laws of this State.

Sec. 92. The certificate of authority of a foreign corporation, subject to the provisions of this Act, may be revoked by the Secretary of State;

(1) Upon failure of an officer, director or manager, to whom interrogatories are propounded, to answer the same fully and to file such answer in the office of the Secretary of State within thirty days after the mailing of the same;

(2) If such corporation is transacting no business in Illinois and has no tangible property in this State;

(3) If the answer to interrogatories propounded by the Secretary of State discloses, or if the fact is otherwise ascertained, that the proportion of the capital stock of such corporation represented in this State is greater than the amount theretofore paid upon by such corporation and the deficiency in such fees is not paid within thirty days of the receipt of a notice sent by mail to the president and secretary, or to the statutory agent of such corporation of record in this State, or to the Attorney filing the interrogatories for such corporation

or is not paid within such extension of time as may be granted by the Secretary of State;

(4) Upon failure of such foreign corporation to keep on file in the office of the Secretary of State duly authenticated copies of each instrument amending its charter;

(5) Upon failure of such foreign corporation to appoint and maintain an agent in this State upon whom service of legal process may be had;

(6) Upon failure, neglect or refusal to file an annual report as required by this Act, or upon failure, neglect or refusal to pay the franchise tax assessed against it on or before the thirty-first day of July of the year in which such franchise tax becomes due and payable;

(7) Upon failure, neglect or refusal to file a certificate of issuance of stock and the payment of the fees required by this Act.

Sec. 96. The Secretary of State shall charge and collect an initial fee of one-twentieth of one percentum upon the amount of the capital stock which the corporation, has issued or it proposes to issue at once, but in no case shall such fee be less than twenty dollars, and a like fee of one-twentieth of one percentum upon filing a certificate of any subsequent issue or increase of capital stock and in addition thereto the same fee as that required for filing other certificates of amendment. In the event that the corporation has capital stock of no par value, its shares, for the purpose of fixing the fee, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares. Each public utility corporation, including railroads, shall pay to the Secretary of State the same fees as are required to

be paid for incorporation by other corporations organized for pecuniary profit.

Sec. 97. The Secretary of State shall also charge and collect the following fees:

(1) For filing and/or issuing a certificate of amendment to the articles of incorporation twenty dollars;

(2) For furnishing certified copy of any paper relating to corporation, twenty-five cents per folio of one hundred words and one dollar for certificate and seal;

(3) For filing certificate of dissolution, one dollar;

(4) For recording any railroad agreement, twenty-five dollars, and for furnishing a certified copy thereof, twenty-five dollars;

(5) For filing certificate of extension of corporate existence or merger or consolidation of corporation he shall charge the same fees as required for the organization of a new corporation.

(6) For issuing amended certificate of incorporation before completing the organization of a corporation, twenty dollars;

(7) For filing and issuing a certificate of change of location or place of business office five dollars.

Sec. 101. Each foreign corporation for pecuniary profit, other than an insurance company or building and loan company, in addition to the annual franchise fees and taxes hereinafter provided, shall pay to the Secretary of State for its certificate of authority to do business in Illinois the same fees provided by This Act to be paid by a similar corporation incorporated under the laws of this State. Each foreign corporation heretofore or hereafter admitted to do business in this State, shall also pay for increases in the amount of capital stock re-

presented in Illinois, for extensions of existence, consolidations, mergers, and for filing amendments the same fees required to be paid by corporations organized under the laws of this State. All such fees shall be based upon the proportion of its issued capital stock represented by business transacted and property located in Illinois. Whenever it shall appear that the amount of capital stock represented in Illinois is greated than the amount theretofore paid upon by any foreign corporation, such corporation, before it shall continue to transact business in Illinois, shall pay to the Secretary of State upon such excess the same fees that a domestic corporation must pay upon an increase in capital stock equal to the amount of such excess.

If a foreign corporation has a capital stock of no par value, its shares, for the purpose of estimating the amount of fees and taxes to be paid hereunder, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares.

Sec. 105. Each corporation for profit, including railroad, except insurance companies, heretofore or hereafter organized under the laws of this State or admitted to do business in this State, and required by this Act to make an annual report, shall pay an annual license fee or franchise tax to the Secretary of State of five cents on each one hundred Dollars of the proportion of its issued capital stock, or amount to be issued at once, represented by business transacted and property located in this State, but in no event shall the amount of such license fee or franchise tax be less than that required by this Act of corporations having no property or business in this State.

In the event that the corporation has stock of no par value, its shares, for the purpose of fixing such fee, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares.

Sec. 106. In ascertaining the amount of the issued capital stock represented by business transacted and property located in this State, the sum of the business of any foreign or domestic corporation transacted in this State and the total property of such corporation located within this State shall be divided by the sum of the total business of the corporation, and the total property of the corporation wherever situated.

Sec. 107. In case it appears from the annual report that the corporation has no property located in this State, and is transacting no business in this State, the following fees shall be paid annually to the Secretary of State as an annual franchise tax; All such corporations having issued capital stock of $50,000 or less shall pay an annual fee of $10; corporations having issued capital stock of more tha $50,000 but not exceeding $200,000 shall pay an annual fee of $15; corporations having issued capital stock of more than $200,000 but not exceeding $500,000 shall pay an annual fee of $20; corporation having issued capital stock of more than $500,000 but not exceeding $1,000,000 shall pay a fee of $50; corporations having issued capital stock of more tha $1,000,000 but not exceeding $10,000,000 shall pay a fee of $200; corporations having issued capital stock of more tha $10,000,000, but not exceeding $20,000,000 shall pay a fee of $500; and all corporations having issued capital stock in excess of $20,000,000 shall pay an annual fee of $1,000.

In the event that the corporation has stock of no par value, its shares, for the purpose of fixing such fee, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares.

Sec. 112. Between the first day of February and the fifteenth day of June of each year, the Secretary of State shall mail a notice in writing to each corporation against which a tax is assessed, notifying such corporation of the amount of the franchise tax assessed against it for the year next ensuing, commencing on July first, and the amount found by the Secretary of State to be due upon an increase of capital stock of a foreign corporation represented in this State, and that objections, if any, to such assessment will be heard by the officer making such assessments, upon request by corporation on a day not later than the twenty-fifth day of June, provided upon proper showing to the Secretary of State that the failure to request a hearing before that date was due to the absence or sickness on the part of some officer of the corporation, the Secretary of State may grant a hearing after that date, but in such case an additional penalty of 5% shall be collected upon the franchise taxes otherwise found to be due the Secretary of State. Such notice shall further state that the tax herein assessed is payable to the officer making the assessment on July first after the date of the notice. The notice required by this section shall be mailed to the corporation addressed to its post office address as shown by the records in the office of the Secretary of State. A failure to receive the notice

mentioned in this section shall not relieve a corporation of the obligation to pay the annual franchise taxes nor shall it invalidate the assessment of the tax.

Sec. 129. In addition to all other fees required by law to be paid, the Secretary of State shall collect in advance from corporations subject to a franchise tax, annual franchise taxes as follows:

(1) If a corporation is organized, or admitted to do business in this State, or its capital stock issued or increased;

(a) Between July first of any year (after the year 1919), and September thirtieth of the same year a franchise tax equal to the full amount of the annual franchise tax;

(b) Between October first of any year (after the year 1919) and December thirty-first of the same year a franchise tax equal to three-fourths of the annual franchise tax;

(c) Between January first of any year and the last day of February of the same year, a franchise tax equal to one-half of the annual franchise tax;

26 (d) Between March first of any year and June thirtieth of the same year, a franchise tax equal to one and one-third of the annual franchise tax.

The franchise tax required by Paragraphs "a", "b" and "c" shall be for authority of the corporation to carry on its corporate business until the thirtieth day of June following the date of payment of such tax. The franchise tax required by paragraph "d" of existing corporations increasing their capital stock shall be for authority of the corporation to employ its increased capitalization in this State until the thirtieth day of the second June following, but such corporation shall still be liable to pay its annual franchise tax upon its

old capital stock in July following in the same manner as required of other corporations not increasing their capital stock. The fees required in this Section shall be based upon the per centum of issued capital stock as evidenced by latest annual report required to be filed under the provisions of this act, if any.

The word "between" as used in this Section shall include both dates specified.

Sec. 2. Whereas, the Supreme Court of this State has held that certain Sections of the General Corporation Act, which based the fees on the authorized capital stock are unconstitutional as to foreign corporations;

Whereas, under the decision of the Supreme Court the Secretary of State will not be able to collect the fees from corporations to which the State is entitled and further, that all of the annual franchise tax provisions of said act are in danger of being invalidated unless said sections are amended, and,

Whereas, the Secretary of State is, under the provisions of Section 112 of the aforesaid act, obliged to mail notice between the first day of February and the fifteenth day of May, in writing, to each corporation against which a franchise tax or fee is assessed, notifying such corporation of the amount of franchise tax or fee assessed against it for the year next ensuing, commencing on July first, and,

Whereas, unless this Act becomes effective on or before May fifteenth the State will lose the fees from corporations to which the State is justly entitled,

Therefore, an emergency exists and this Act shall take effect and be in full force from and after its passage.

Endorsed: Filed Jul. 21, 1927, S. T. Burnett, Clerk.

ued July 21, 1928.

27 And afterwards, to wit: on the 21st day of July, A. D. 1928, there was issued by the clerk of said court, a certain Chancery Subpoena, which said Chancery Subpoena together with the Marshal's Return thereon, was and is in the words and figures, following, to wit:

28 United States of America
Southern District of Illinois } ss.
Southern Division

The United States of America To Louis L. Emmerson, Secretary of State of the State of Illinois, Greeting:

We Command You and Every of You, That you appear before our Judge of our District Court of the United States of America, for the Southern District of Illinois, at Springfield, in said District, on the 10th day of August, A. D. 1927, at 9 o'clock A. M., to answer the bill of complaint of St. Louis Southwestern Railway Company, a Corporation, this day filed in the office of the Clerk of said court in the City of Springfield then and there to receive and to abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the Marshal of the Southern District of Illinois to execute.

Witness, the Honorable Louis FitzHenry, Judge of the District Court of the United States for the Southern District of Illinois, at Springfield, aforesaid, this 21st day of July, in the year of our Lord one thousand nine hundred and twenty-seven, and of our Independence the fifty-second year.

S. T. BURNETT,
Clerk.

(Seal)

Memorandum

The above-named defendant is notified that unless he and each of them shall file his answer or other defense in the office of the Clerk of said Court, at Springfield aforesaid, on or before the twentieth day after service of this process, excluding the day of such service, the bill of complaint filed herein will be taken against him as confessed, and a decree entered accordingly.

S. T. BURNETT,
Clerk.

United States of America
Southern District of Illinois } ss.
Southern Division.

I duly executed the within writ of service upon the within named Louis L. Emmerson by reading the same and delivering a true copy thereof to A. C. Margrave, Chief Clerk Corporation department, at Springfield, Sangamon County, Illinois, this 23rd day of July, A. D. 1927. The within named Louis L. Emmerson, Secretary of State of the State of Illinois not found in this district.

C. W. CUSHING,
U. S. Marshal.
By W. L. MOODY,
Deputy.

Marshal's Fees $2.06.

(Endorsed) Chancery Subpoena. Filed July 25, 1927. S. T. Burnett, Clerk.

29 And afterwards, to wit: on the 22nd day of July, A. D. 1927, there was filed in the office of the clerk of said court, a certain motion for temporary restraining order, which said motion was and is in the words and figures, following, to wit:

30 * * (Caption) * *

MOTION FOR TEMPORARY RESTRAINING ORDER.

Now comes the complainant in the above entitled cause and moves for a temporary restraining order in accordance with the prayer of the Bill of Complaint filed herein.

H. L. BROWNING,
JOSIAH WHITNEL,
Attorneys for Complainant.

J. R. TURNEY,
Of Counsel.

Endorsed: Filed Jul. 22, 1927, S. T. Burnett, Clerk.

31 And afterwards, to wit: on the 22nd day of July, A. D. 1927, the following further proceedings were had in said court in said cause and were entered of record to wit:

32 • • (Caption) • •

ORDER.

Whereas, the Bill of Complaint in the above entitled cause prays that a temporary restraining order be entered, pending the hearing on an application for an interlocutory or preliminary injuction; and the complainant has, on this the 22 day of July, A. D. 1927, moved for such temporary restraining order, and,

Whereas, after examining and considering the verified Bill of Complaint, it appears that the complainant will suffer irreparable injury unless said temporary restraining order be entered in accordance with said prayer and motion, in that, after August 1, 1927, the authority of said complainant to do business in Illinois would be subject to revocation unless said restraining order be entered, and the complainant and its employees would thereupon be subject to divers penalties and forfeitures, and,

Whereas, the defendant, by his Counsel, is present in Court at the time of said application and motion for a temporary restraining order is made,

And it appearing to the Court that cause exists for the granting of said restraining order, pending a hearing on
33 and determination of the application for an interlocutory injunction in this cause.

It Is Therefore Ordered that the defendant, Louis L. Emmerson, Secretary of State of the State of Illinois, his representatives, agents, employees and all persons acting under or for him, be, and they are hereby enjoined, pending the consideration and determination of said application for an interlocutory injunction, from in any manner whatsoever revoking or taking steps to revoke the certificate of authority of the St. Louis Southwestern Railway Company to do business within the State of Illinois, because or on account of the refusal and failure of said St. Louis Southwestern Railway Company to pay an annual license fee or franchise tax assessed against it by said defendant, for the year beginning July 1, 1927 and ending June 30, 1928.

It Is Further Ordered that the defendant, Louis L. Em-

merson, Secretary of State of the State of Illinois, his agents, employees and all persons acting under him be enjoined, during said time, for hindering or forbidding the St. Louis Southwestern Railway Company from transacting business in the State of Illinois or from instituting any proceedings or filing any complaint, and from requesting the Attorney General of the State of Illinois, or his associates, to institute such proceeding, or in any manner taking any steps whatsoever, to enforce any of the penalties, forfeitures or prohibitions against said St. Louis Southwestern Railway Company, provided for on account of its refusal to pay such license or franchise tax.

It Is Further Ordered by the Court, that the complainant give bond, to be approved by the Clerk of the Court, in the penal sum of Two Thousand ($2000.00) Dollars, conditioned upon the payment of all costs and damages suffered by the defendant, if it shall be determined that he was wrongfully enjoined.

34

LOUIS FITZHENRY
Judge.

Endorsed: Filed Jul. 22, 1927, S. T. Burnett, Clerk.

35 And afterwards, to wit: on the 4th day of November, A. D. 1927, there was filed in the office of the clerk of said court, a certain Motion to Dismiss, which said Motion to Dismiss was and is in the words and figures, following to wit: Filed Nov. 4, 1927.

36 • • (Caption) • •

And now comes the above named defendant, by Oscar E. Carlstrom, Attorney General of the State of Illinois, his attorney, and moves the Court to dismiss the bill of complaint filed herein for want of equity, and to grant such other and further relief in the premises as may be just.

OSCAR E. CARLSTOM,
Attorney General of the State of Illinois
Attorney for Defendant

B. L. CATRON,
Assistant Attorney General
Of Counsel.

Endorsed: Filed Nov. 4, 1927, S. T. Burnett, Clerk.

d May 14. 28.

37 And afterwards, to wit: on the 14th day of May, A. D. 1928, there was filed in the office of the clerk of said court, a certain Memorandum of Views of the Court, which said Memorandum of Views, was and is in the words and figures, following, to wit:

38 * * * (Caption) * *

MEMORANDUM.

Plaintiff is a railroad corporation, organized under the laws of Missouri, with a capital stock of $36,249,750. Of this total capital stock, .00746% is represented by property owned and business done in the State of Illinois, as shown by the corporation's annual report, filed for the year 1927, as required by law, with the Secretary of State of Illinois. In extending the corporation franchise tax under the Illinois Corporation Act, the plaintiff corporation was assessed $1,000, being the minimum tax provided by § 107 of said Act.

Plaintiff alleges the tender and willingness to pay a tax of $135.21, the amount it claims due from it under § 105 of the Act, which provides a tax upon foreign corporations based upon the property owned in Illinois and business done in Illinois. Plaintiff seeks to enjoin the defendant from invoking any of the penalties and forfeitures for a failure to pay the tax as assessed and levied, upon the ground that § 107 of the Illinois Corporation Act, as applied to plaintiff, is illegal and violates plaintiff's constitutional rights. Plaintiff complains of the Illinois statute as follows:

1. It unreasonably interferes with and directly burdens interstate commerce;

39 2. It denies plaintiff the equal protection of the law; and,

3. Deprives it of property without due process. These assignments are based upon plaintiff's conclusion that its tax should have been assessed and extended under § 105 of the Corporation Act, when in truth and in fact, the Secretary of State extended it under § 107, which plaintiff claims is unconstitutional and void.

Defendant moves to dismiss plaintiff's bill.

The two sections of the Illinois Statute, as amended and in force at the time in question and involved here, are as follows:

"Section 105. Each corporation for profit, including rail-

roads, except insurance companies, heretofore or hereafter organized under the laws of this State or admitted to do business in this State, and required by this Act to make an annual report, shall pay an annual license fee or franchise tax to the Secretary of State of five cents on each one hundred dollars of the proportion of its issued capital stock, or amount to be issued at once, represented by business transacted and properly located in this State, but in no event shall the amount of such license fee or franchise tax be less than that required by this Act of corporations having no tangible property or business in this State.

"In the event that the corporation has stock of no par value, its shares, for the purpose of fixing such fee, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares."

"Section 107. In case it appears from the annual report that the corporation has no property located in this State, and is transacting no business in this State, the following fees shall be paid annually to the Secretary of State as an annual franchise tax: All such corporations having issued capital stock of $50,000 or less shall pay an annual fee of $10; corporations having issued capital stock of more than $50,000 but not exceeding $200,000 shall pay an annual fee of $15; corporations having issued capital stock of more than $200,000 but not exceeding $500,000 shall pay an annual fee of $20; corporations having issued capital stock of more than $500,000 but not exceeding $1,000,000 shall pay a fee of $50; corporations having issued capital stock of more than $1,000,000 but not exceeding $10,000,000 shall pay a fee of $200; corporations having issued capital stock of more than $10,000,000 but not exceeding $20,000,000 shall pay a fee of $500; and all corporations having issued capital stock in excess of $20,000,000 shall pay an annual fee of $1,000.

"In the event that the corporation has stock of no par value, its shares, for the purpose of fixing such fee, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares."

40 The merits of the controversy raised by plaintiff's bill and defendant's motion to dismiss, involve the construction of Sections 105 and 107 of the Illinois Corporation Act, above quoted. The contention of plaintiff is that its tax should be levied under § 105, because it has property in the state and is doing business, and its tax should be based upon the proportion that the property of plaintiff in the state and its business done in the state bears to the total property and busi-

May 14, 28. 37 And afterwards, to wit: on the 14th day of May, A. D. 1928, there was filed in the office of the clerk of said court, a certain Memorandum of Views of the Court, which said Memorandum of Views, was and is in the words and figures, following, to wit:

38 * * (Caption) * *

MEMORANDUM.

Plaintiff is a railroad corporation, organized under the laws of Missouri, with a capital stock of $36,249,750. Of this total capital stock, .00746% is represented by property owned and business done in the State of Illinois, as shown by the corporation's annual report, filed for the year 1927, as required by law, with the Secretary of State of Illinois. In extending the corporation franchise tax under the Illinois Corporation Act, the plaintiff corporation was assessed $1,000, being the minimum tax provided by § 107 of said Act.

Plaintiff alleges the tender and willingness to pay a tax of $135.21, the amount it claims due from it under § 105 of the Act, which provides a tax upon foreign corporations based upon the property owned in Illinois and business done in Illinois. Plaintiff seeks to enjoin the defendant from invoking any of the penalties and forfeitures for a failure to pay the tax as assessed and levied, upon the ground that § 107 of the Illinois Corporation Act, as applied to plaintiff, is illegal and violates plaintiff's constitutional rights. Plaintiff complains of the Illinois statute as follows:

1. It unreasonably interferes with and directly burdens interstate commerce;

39 2. It denies plaintiff the equal protection of the law; and,

3. Deprives it of property without due process. These assignments are based upon plaintiff's conclusion that its tax should have been assessed and extended under § 105 of the Corporation Act, when in truth and in fact, the Secretary of State extended it under § 107, which plaintiff claims is unconstitutional and void.

Defendant moves to dismiss plaintiff's bill.

The two sections of the Illinois Statute, as amended and in force at the time in question and involved here, are as follows:

"Section 105. Each corporation for profit, including rail-

roads, except insurance companies, heretofore or hereafter organized under the laws of this State or admitted to do business in this State, and required by this Act to make an annual report, shall pay an annual license fee or franchise tax to the Secretary of State of five cents on each one hundred dollars of the proportion of its issued capital stock, or amount to be issued at once, represented by business transacted and properly located in this State, but in no event shall the amount of such license fee or franchise tax be less than that required by this Act of corporations having no tangible property or business in this State.

"In the event that the corporation has stock of no par value, its shares, for the purpose of fixing such fee, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares."

"Section 107. In case it appears from the annual report that the corporation has no property located in this State, and is transacting no business in this State, the following fees shall be paid annually to the Secretary of State as an annual franchise tax: All such corporations having issued capital stock of $50,000 or less shall pay an annual fee of $10; corporations having issued capital stock of more than $50,000 but not exceeding $200,000 shall pay an annual fee of $15; corporations having issued capital stock of more than $200,000 but not exceeding $500,000 shall pay an annual fee of $20; corporations having issued capital stock of more than $500,000 but not exceeding $1,000,000 shall pay a fee of $50; corporations having issued capital stock of more than $1,000,000 but not exceeding $10,000,000 shall pay a fee of $200; corporations having issued capital stock of more than $10,000,000 but not exceeding $20,000,000 shall pay a fee of $500; and all corporations having issued capital stock in excess of $20,000,000 shall pay an annual fee of $1,000.

"In the event that the corporation has stock of no par value, its shares, for the purpose of fixing such fee, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares."

40 The merits of the controversy raised by plaintiff's bill and defendant's motion to dismiss, involve the construction of Sections 105 and 107 of the Illinois Corporation Act, above quoted. The contention of plaintiff is that its tax should be levied under § 105, because it has property in the state and is doing business, and its tax should be based upon the proportion that the property of plaintiff in the state and its business done in the state bears to the total property and busi-

ness of the corporation which is represented by the entire capital stock. That proportion is a very small one and if its tax were computed according to the provisions of § 105, disregarding, however, a very material provision of the statute, it would be deemed by plaintiff reasonable and not discriminatory; but that the Secretary of State, having assessed plaintiff a tax under § 107, has taxed it out of all proportion to what it considers an approximate tax under § 105 and entirely disregards the amount of business transacted and the property of the tax payer in the State.

The two statutes here involved attempt to tax two entirely different things. Section 107 is clearly "a franchise tax" while Section 105 provided a tax upon "the exercise of the franchise" and does not become operative until the business done and property used in the exercise of the franchise, measured by the standards provided in § 105, produce an amount equal to or greater than the amount of the mere franchise tax provided in § 107. When that point is reached in the exercise of the franchise, then § 107 ceases to be operative and § 105 controls the amount.

Section 107, it will be noted, applies to a corporation which "has no property located in this State, and is transacting no business in this State". However, § 105, taxing the exercise of the franchise, contains the provision, "but in no
41 event shall the amount of such license fee or franchise tax be less than that required by this Act of corporations having no tangible property or business in this State." In other words, so far as the provisions of § 105 are concerned, they do not apply and are not operative unless the franchise is exercised to the extent necessary to supercede the operation of § 107.

Where a corporation does so small an amount of business and uses so small a proportion of its property in the State as not to produce a tax under § 105 equal to or greater than the franchise tax provided in § 107, it is treated by the public policy of the state for taxing purposes as having no property in the State and doing no business in the State.

To sustain plaintiff's position, it is necessary to hold that the State has no power to enact a corporation taxing statute of the character of § 107.

Plaintiff relies upon the expression of the United States Supreme Court in *International Paper Co.* v. *Massachusetts*, 246 U. S. 135, 38 S. Ct. 292. That was a suit by a New York corporation to recover the amount of an excise tax assessed against it in Massachusetts, for the year 1915 and paid under

protest, the right to recover being predicated on the asserted invalidity of the tax under the commerce clause of the Constitution (Art. 1, § 8, Cl. 3) and the due process clause of the 14th Amendment. In that case, the Massachusetts statute required the Taxing Commissioner to levy an excise tax upon the coming in of the annual report of a foreign corporation of 1/50 of 1% of the par value of its authorized capital stock, not to exceed $2,000. Another statute, referring to the one just above mentioned (§ 56), provided (St. 1914, C. 724, § 1) for the collection of another tax at the time of the filing of its annual certificate of condition, from the same corporation, an excise tax of 1/100 of 1% of the par value of its
42 authorized capital stock in excess of $10,000,000. The plaintiff was the owner of 23 paper mills, one in Massachusetts and 22 in other states. The entire 23 paper mills, business, good will, etc., of the corporation was represented by the entire authorized capital stock, whether in the state or out of the state. In other words, the statutes of Massachusetts involved in that case made a plain tax levy upon the entire property of the foreign corporation.

After reviewing all of the authorities, the Supreme Court, in the last paragraph of the opinion, gives its final conclusion in these words:

"What has been said sufficiently shows the tax in question should have been declared unconstitutional and void as placing a prohibited burden on interstate commerce and laid (a tax) on property of a foreign corporation located and used beyond the jurisdiction of the state."

The Massachusetts statutes were plain excise statutes, levied upon all of the authorized capital stock of the corporation, and clearly were unconstitutional for that reason. In discussing what the Court had previously said in *Western Union Telegraph Co.* v. *Kansas,* 216 U. S., 1, 30 S. Ct. 190, the Court said:

"This court unanimously pronounced the Texas statute invalid as placing 'direct burdens on interstate commerce' and taxing 'property and rights which were wholly beyond the confines of the state and not subject to its jurisdiction."

Do the Illinois statutes here involved come within the rules discussed in the International Paper Co. case, supra; that is, do they lay an unlawful burden on interstate commerce or attempt to tax property outside of the jurisdiction of the state, or both?

The rule is established by other decisions of the Court that a graduated franchise tax which does not vary in direct pro-

portion to the authorized or issued capital stock of a corporation, and which is limited to a reasonable maximum amount, does not violate the commerce clause of the Federal Constitution, or the due process or equal protection clause of
43 the 14th Amendment. Section 105 certainly cannot be held to be an attempt to unduly burden interstate commerce, because the tax provided in that section is limited to the business done and property used in the state, and is reasonable.

Plaintiff's serious complaint, however, is concerning § 107, whereby it claims the State of Illinois discriminates against it and charges it a greater franchise tax proportionately than it does other foreign corporations securing equal privileges from the State; that is, the total property owned and business done by plaintiff in Illinois during the year in question, amounted to $789,064.36; its capital stock, represented by such property and business, amounted to $270,423. In other words, it claims $270,423 of plaintiff's capital (the total amount being $36,249,750), or, .00746% of its issued stock. It also challenges the power of Illinois to assess a privilege tax or fee on any portion of its capital stock other than the proportion of the capital stock represented by the business done and the property used in the State.

It must be borne in mind that under the two sections of the Ililinois statutes here involved, unless the business done and property used is of sufficient volume and quantity to produce a tax at least equal in amount to the franchise or privilege tax fixed in § 107, then it is to be treated as if no business was done and no property had been used, and the franchise tax assessed accordingly.

The power of Illinois to levy a franchise, or privilege tax, or an entrance tax, as it is called in some of the statutes, is settled by *General Railway Signal Co.* v. *Virginia*, 246 U. S. 450, 38 S. Ct., 460. In that case, Mr. Justice McReynolds, speaking for the Court, said:

"Section 38a, c.53, Acts of Virginia 1910 (copied in margin) requires every foreign corporation with capital over one million and not exceeding ten million dollars when it obtains a certificate of authority to do local business to pay a fee of one thousand dollars. Inspection of the state shows that prescribed fees do not vary in direct proportion to
44 capital stock and that a maximum is fixed. In the class to which plaintiff in error belongs the amount specified is one thousand dollars and, under all the circumstances, we cannot say this is wholly arbitrary or unreasonable."

Section 107 of the Illinois Act applies to all corporations which have no property and transact no business, in the State. It seems to have been designed to cover the situation of foreign corporations making application to qualify for the purpose of receiving grants to exercise their franchises in the State of Illinois which do not exercise those franchises, but are the owners of the right and privilege to do so to whatever extent they may desire, within the law.

It is true the situation in which plaintiff finds itself and which gives rise to its very earnest complaint is a pronounced and direct illustration of the peculiar situations which may arise. Here is a railroad corporation with an immense capital stock, aggregating almost forty millions. It makes application to the proper officers of the State Government to grant it the right to exercise its franchise in the State of Illinois. When it qualifies, it asks for permission to operate a railway franchise. The value of the franchise necessarily bears a most legitimate relation to the amount of capital stock to be used in connection with the exercise of the franchise. When the right was granted, plaintiff, by its qualification under the Illinois law, was given the right to use just as much or just as little of its capital stock in the exercise of its franchise as it saw fit. Manifestly, the legislature could not anticipate, nor could the ministerial officers granting the privilege know, the exact amount of capital stock that the foreign corporation sought to use under the grant. This Court does not believe it was either arbitrary or unreasonable for the State to exact a maximum amount which should be paid by the foreign corporation for the privilege granted it by reason of its qualification under the laws of Illinois.

45 When the St. Louis Southwestern Railway Company made application through the Secretary of State for permission to enter the State and exercise its franchise as a railway company with a large capital stock, and when that application was granted, the effect of the allowance of the prayer of plaintiff amounted to the granting of a franchise by the State of Illinois to plaintiff. The valuable rights which thereupon accrued to it were property of the highest character, and it is these valuable rights, which belonged to the State, and, which were given to plaintiff to use, which the State sought to tax in the manner and amount prescribed in § 107.

Because the capital stock of the corporation is one of the elements used by the statute in computing the amount of the franchise tax, plaintiff concludes it is in effect a tax upon all

of the physical property of plaintiff corporation, more than ninety-nine per cent of which is outside of the State of Illinois. If the tax levied under § 107 was a tax upon property of a foreign corporation outside the State, then the rules announced in *International Paper Co.* v. *Massachusetts, supra,* would prevail and the statute would be unconstitutional. However, such is not the case, for § 107 is clearly designed to tax the holders of valuable grants of privileges made by the State to those corporations which voluntarily make application for them and bring themselves within the law to the extent that the grant becomes effective.

The tax is made substantial and it is the duty of the Courts to presume that in fixing the amount of the franchise tax, the legislature had good and sufficient reasons for making it so. And in devising an uniform method for the ascertainment of the tax, it was entirely reasonable that the financial ability of the applicant corporation should bear a rational relation to the value of the rights granted. It is also
46 reasonable for the legislature to fix the amounts of the several taxes provided for in § 107 at such a sum as would have a tendency to discourage the holding of franchises of great value without them being exercised for the benefit of the public.

Plaintiff complains that it is discriminated against because another corporation with an issued capital stock of $270,423, and having all its property and business in Illinois, would be required to pay a tax of but $135.21 yet the State of Illinois insists upon plaintiff paying a sum of $1000, for doing the same amount of business and having the same amount of property in the State of Illinois. It similarly complains because another foreign corporation, with a capital stock of $1,000,000, and $270,423 of that capital represented in Illinois, would pay only $135.21, while plaintiff is required to pay $1,000.

The answer to this complaint is that if plaintiff had a capital stock of $1,000,000, and did the amount of business which it has done in this State, it, too, would be required to pay only $135.21.

The provision in § 105, " * * * but in no event shall the amount of such license fee or franchise tax be less than that required by this Act of corporations having no tangible property or no business in this State", might be treated as either a minimum tax or a provision that the requirements of § 105 would not apply until after sufficient business had been transacted and property of the corporation used in the

State to warrant assessing under its provisions a tax equal to or greater than the tax provided under the provisions of § 107. The effect is to regard the exercise of a franchise so slightly that it would not be considered as having been exercised at all.

Counsel for plaintiff especially urge upon the Court this language used in *General Railway Signal Co.* v. *Virginia, supra;*

47 "It seems proper, however, to add that the case is along the border line."

Preceding the above sentence is the following:

"Considering what we said in (citing a number of decisions of the Court) the two characteristics of the statute just referred to, must be regarded as sufficient to save its validity."

The two characteristics referred to by Mr. Justice McReynolds are: (1) That the prescribed fees do not vary in direct proportion to capital stock and that a maximum is fixed; (2) In the class to which plaintiff in error belongs the amount specified is $1,000 and "under all the circumstances, we cannot say this is wholly arbitrary or unreasonable."

So, in this case, we conclude that the case made out by plaintiff's bill may also be along the border line, but the taxing statutes here involved, possessing the two characteristics referred to in the *General Railway Signal Co.* case, *supra,* must be regarded as sufficient to have their validity.

Defendant's motion to dismiss will be allowed and an order to that effect may be prepared and submitted.

Endorsed: Filed May 14, 1928, S. T. Burnett, Clerk.

48 And afterwards, to wit: on the 7th day of June, A. D. 1928, the following further proceedings were had in said court in said cause and were entered of record to wit: Entered June 1928.

49 * * (Caption) * *

This cause coming on to be heard upon the motion of the defendant to dismiss the bill of complaint in said cause for want of equity, and the Court having heard the arguments of counsel for the respective parties thereon, and being now fully advised in the premises, upon consideration thereof, doth find that said motion should be allowed.

It Is Therefore Ordered, Adjudged and Decreed by the

Court that the said motion of the defendant to dismiss the said bill of complaint herein be, and the same is hereby allowed, and the said bill of complaint is hereby dismissed for want of equity, and the temporary restraining order heretofore entered herein is hereby set aside and dissolved, and the plaintiff is ordered to pay the costs incurred herein within thirty days from the date hereof.

Enter:

LOUIS FITZHENRY
Judge.

Endorsed: Filed Jun. 7, 1928, S. T. Burnett, Clerk.

Filed June 21, 1928.

50 And afterwards, to wit: on the 21st day of June, A. D. 1928, there was filed in the office of the clerk of said court, a certain Exception to holding and order of the court, which said Exception was and is in the words and figures, following, to wit:

51 * * (Caption) * *

Now comes the plaintiff, St. Louis Southwestern Railway, a corporation, by Josiah Whitnel and H. L. Browning, its Solicitors, and excepts to the holding and Order of Court entered herein, granting the motion of defendant to dismiss its Bill of Complaint, dissolving the Temporary Restraining Order heretofore granted and dismissing its Bill of Complaint, for want of equity, and prays the Court to allow it an Exception on account thereof.

JOSIAH WHITNEL
H. L. BROWNING

Exception allowed this 21st day of June, A. D. 1928.

FITZHENRY
Judge.

Endorsed: Filed Jun. 21, 1928, S. T. Burnett, Clerk.

52 And afterwards, to wit: on the 21st day of June, A. D. 1928, there was filed in the office of the clerk of said court, a certain petition for appeal, which said petition for appeal was and is in the words and figures, following, to wit:

53 • • (Caption) • • Filed June 1 1928.

PETITION FOR APPEAL.

The plaintiff, St. Louis Southwestern Railway Company, conceiving itself aggrieved by the Order and Decree made and entered on the 8th day of June, A. D. 1928, dismissing plaintiff's Bill of Complaint and setting aside and dissolving the Temporary Restraining Order heretofore entered in said cause, does hereby appeal from said Orders and Decrees, to the United States Circuit Court of Appeals, for the Seventh Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and it prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said Orders were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Seventh Circuit.

JOSIAH WHITNEL
H. L. BROWNING.

The foregoing petition is allowed this 21st day of June, 1928, as per Order on file.

LOUIS FITZHENRY
Judge.

Endorsed: Filed Jun. 21, 1928, S. T. Burnett, Clerk.

54 And afterwards, to wit: on the 21st day of June, A. D. 1928, there was filed in the office of the clerk of said court, a certain Assignment of Errors, which said Assignment of Errors is in the words and figures, following, to wit: Filed June 21 1928.

55 • • (Caption) • •

ASSIGNMENT OF ERRORS.

Now on the 20th day of June, A. D. 1928, comes the plaintiff, St. Louis Southwestern Railway Company, by its Solicitors, and says that the order and decree made and entered herein on the 8th day of June, A. D. 1928, by the United States District Court, for the Southern District of Illinois, allowing the Motion of the defendant to Dismiss, and dismissing its Bill of Complaint and dissolving the Temporary Restraining Order heretofore entered herein, is erroneous

and against the just rights of the plaintiff, for the reasons hereinafter set forth; each of which the plaintiff assigns as error:

1. The District Court erred in allowing the defendant's Motion to Dismiss, and in dismissing plaintiff's Bill of Complaint.

2. The District Court erred in refusing to hold that Paragraphs 105 and 107 of the General Incorporation Act of the State of Illinois, as applied to the plaintiff under the facts set forth in the Bill of Complaint, and the exaction by the defendant of a Franchise Tax of One Thousand ($1,000.00) Dollars thereunder, deprived the plaintiff of its property without due process of law, in violation of its rights under the Fourteenth Amendment to the Constitution of the United States.

3. The District Court erred in refusing to hold that
56 Paragraphs 105 and 107 of the General Incorporation Act of the State of Illinois, as applied to the plaintiff, under the facts set forth in the Bill of Complaint and the exaction by the defendant of a Franchise Tax of One Thousand ($1,000.00) Dollars thereunder, constituted a direct burden on interstate commerce, in violation of plaintiff's rights under Clause 3 of Section 8 of Article 1, of the Constitution of the United States.

4. The District Court erred in refusing to hold that Paragraphs 105 and 107 of the General Incorporation Act of the State of Illinois, as applied to the plaintiff, under the facts set forth in the Bill of Complaint and the exaction by the defendant of a Franchise Tax of One Thousand ($1,000.00) Dollars thereunder, denied plaintiff of the equal protection of the law, and abridged its privileges and immunities as a citizen of the United States and of the State of Missouri, in violation of plaintiff's rights under the Fourteenth Amendment to the Constitution of the United States.

Wherefore, the plaintiff prays that the order and decree, heretofore mentioned, entered in this cause, be annulled, set aside, and held for naught, and that same be reversed and Remanded to said District Court with instructions to deny the defendant's Motion to Dismiss.

JOSEPH WHITNEL,
H. L. BROWNING,
Solicitors for Plaintiff.

(Endorsed) * * (Caption) * * Assignment of Errors.
Filed Jun 21 1928 at ..... o'clock ....M. S. T. Burnett, Clerk.

57 And afterwards, to wit: on the 21st day of June, A. D. 1928, the following further proceedings were had in said court in said cause and were entered of record to wit: Entered June 21, 1928.

58 • • (Caption) • •

ORDER ALLOWING APPEAL.

And now on this 21st day of June, A. D. 1928, comes the plaintiff, St. Louis Southwestern Railway Company, by H. L. Browning and Josiah Whitnel, its Solicitors, and prays an exception and an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, from the Orders and Decrees entered herein, on the 8th day of June, A. D. 1928, allowing the defendant's motion to dismiss and dismissing the plaintiff's Bill of Complaint, for want of equity, and setting aside and disolving the Temporary Restraining Order heretofore entered in said cause, which exception and prayer for appeal is allowed by the Court; plaintiff to file Appeal Bond in the sum of Two Thousand ($2,000.00) Dollars, with good and sufficient surety to be approved by the Court; same to be filed in thirty days.

Enter:

LOUIS FITZHENRY,
Judge.

Endorsed: Filed Jun. 21, 1928, S. T. Burnett, Clerk.

59 And afterwards, to wit: on the 21st day of June, A. D. 1928, there was filed in the office of the clerk of the district court of the United States for said district, a certain Bond on Appeal, which said Bond was and is in the words and figures, following, to wit: Filed June 21, 1928.

60 Certified copy.

General Power of Attorney.

41465.

Know All Men By These Presents:

That the United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the

Power of Attorney.

State of Maryland, and having its principal office at the City of Baltimore, in the State of Maryland, does hereby constitute and appoint

T. F. Browne, J. E. Auchly and Jno. W. Bebout

of the City of St. Louis, State of Missouri, its true and lawful attorneys for the following purposes, to wit:

To sign its name as surety to, and to execute, seal and acknowledge any and all bonds, and to respectively do and perform any and all acts and things set forth in the resolution of the Board of Directors of the said United States Fidelity and Guaranty Company, a certified copy of which is hereto annexed and made a part of this Power of Attorney; and the said United States Fidelity and Guaranty Company, through us, its Board of Directors, hereby ratifies and confirms all and whatsoever any one of the said T. F. Browne and the said J. E. Auchly and the said Jno. W. Bebout may lawfully do in the premises by virtue of these presents.

In Witness Whereof the said United States Fidelity and Guaranty Company has caused this instrument to be sealed with its corporate seal, duly attested by the signatures of its Vice-President and Assistant Secretary, this 29th day of December, A. D. 1926.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
By (Signed) CHAS. O. SCULL,
Vice-President.

(Seal)

(Signed) CHARLES V. HEMSLEY,
Assistant Secretary.

61 State of Maryland } ss.
Baltimore City }

On this 29th day of December, A. D. 1926 before me personally came Chas. O. Scull, Vice-President of the United States Fidelity and Guaranty Company, and Charles V. Hemsley, Assistant Secretary of said Company, with both of whom I am personally acquainted, who being by me severally duly sworn, said that they resided in the City of Baltimore, Maryland; that they, the said Chas. O. Scull andCharles V. Hemsley were respectively the Vice-President and Assistant Secretary of the said United States Fidelity and Guaranty Company, the corporation described in and which executed the foregoing Power of Attorney; that they each knew the seal of said corporation; that the seal affixed to said Power of

Attorney was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that they signed their names thereto by like order as Vice-President and Assistant Secretary respectively, of the Company.

My Commission expires the first Monday in May, A. D. 1927.

(Signed) A. D. PATRICK,
Notary Public.

(Seal)

State of Maryland, } Set.
Baltimore City. }

I, Stephen C. Little, Clerk of Superior Court of Baltimore City, which Court is a Court of Record, and has a seal, do hereby certify that A. D. Patrick, Esquire, before whom the annexed affidavits were made, and who has thereto subscribed his name, was at the time of so doing a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and sworn and authorized by law to administer oaths and take acknowledgments, or proof of deeds to be recorded therein. I further certify that I am acquainted with the handwriting of the said Notary, and verily believe the signature to be his genuine signature.

In Testimony Whereof, I hereto set my hand and affix the seal of the Superior Court of Baltimore City, the same being a Court of Record, this 29th day of December, A. D. 1926.

(Signed) STEPHEN C. LITTLE,
Clerk of the Superior Court of Baltimore City.

(Seal)

62 COPY OF RESOLUTION.

That Whereas, it is necessary for the effectual transaction of business that this Company appoint agents and attorneys with power and authority to act for it and in its name in States other than Maryland, and in the Territories of the United States and in the provinces of the Dominion of Canada and in the Colony of Newfoundland.

Therefore, Be It Resolved, that this Company do, and it hereby does, authorize and empower its President or either of its Vice-Presidents in conjunction with its Secretary or one

of its Assistant Secretaries, under its corporate seal, to appoint any person or persons as attorney or attorneys-in-fact, or agent or agents of said Company, in its name and as its act, to execute and deliver any and all contracts guaranteeing the fidelity of persons holding positions of public or private trust, guaranteeing the performance of contracts other than insurance policies and executing or guaranteeing bonds and undertakings, required or permitted in all actions or proceedings or by law allowed, and

Also in its name and as its attorney or attorneys-in-fact, or agent or agents to execute and guarantee the conditions of any and all bonds, recognizances, obligations, stipulations, undertakings or anything in the nature of either of the same, which are or may by law, municipal or otherwise, or by any Statute of the United States or of any State or Territory of the United States or of the Provinces of the Dominion of Canada or of the Colony of Newfoundland, or by the rules, regulations, orders, customs, practice or discretion of any board, body, organization, office or officer, local, municipal or otherwise, be allowed, required or permitted to be executed, made, taken, given, tendered, accepted, filed, or recorded for the security or protection of, by or for any person or persons, corporation, body, office, interest, municipality or other association or organization whatsoever, in any and all capacities whatsoever, conditioned for the doing or not doing of anything or any conditions which may be provided for
63 in any such bond, recognizance, obligation, stipulation, or undertaking, or anything in the nature of either of the same.

I, Charles V. Hemsley, Assistant Secretary of the United States Fidelity and Guaranty Company, hereby certify that at a regular meeting of the Board of Directors of said Company, duly called and held at the office of the Company, at the City of Baltimore, on the 11th day of July, A. D. 1910, at which was present a quorum of said Directors, duly authorized to act in the premises, resolutions were passed and entered on the minutes of said Company, of which resolutions the foregoing is a true copy and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and the seal of the United States Fidelity and Guaranty Company, this 29th day of December, A. D. 1926.

(Signed) CHARLES V. HEMSLEY,
Assistant Secretary.

(Seal)

I, Charles V. Hemsley, Assistant Secretary of the United States Fidelity and Guaranty Company, do hereby certify that the above and foregoing is a full, true and correct copy of the original power of attorney given by said Company to T. F. Browne, J. E. Auchly and Jno. W. Bebout of St. Louis, Missouri, authorizing and empowering them to sign bonds as therein set forth; and do hereby further certify that the said power of attorney is still in full force and effect.

Given under my hand and the seal of said Company, at Baltimore, Maryland, this 15th day of December, A. D. 1927.

CHARLES V. HEMSLEY,
Assistant Secretary.

64 BOND ON APPEAL.

Know All Men by These Presents: That we, the St. Louis Southwestern Railway Company, a corporation, plaintiff, as principal, and United States Fidelity & Guaranty Co. as surety, are held and firmly bound unto Louis L. Emmerson, as Secretary of State of the State of Illionis, defendant, in the full and just sum of Two Thousand ($2,000.00) Dollars, to be paid to said Louis L. Emmerson as Secretary of State of the State of Illinois, his successor or assign, to which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by the presents.

Sealed with our seals and dated this 16th day of June, A. D. 1928.

Whereas, lately in the District Court of the United States for the Southern District of Illinois, in a suit in Equity pending in said Court between the above bounden St. Louis Southwestern Railway Company, as plaintiff, and said Louis L. Emmerson, as Secretary of State of the State of Illinois, as defendant, a certain order and decree was entered, dismissing the Bill of Complaint of said St. Loius Southwestern Railway Company for want of Equity, and said plaintiff having prayed and obtained an appeal therefrom, to the United States Circuit Court of Appeals, for the Seventh Circuit.

Now the Condition of the above obligation is such, that if the said St. Louis Southwestern Railway Company, plaintiff, shall prosecute its said appeal with effect and answer all damages and costs, if it fails to make good its plea, then the

above obligation to be void, otherwise to remain in full force and virtue.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
By JAMES E. GASSTANG,
Atty.

UNITED STATES FIDELITY & GUARANTY CO.
By T. F. BROWNE,
Attorney-in-fact.

Attest:

.....
Secretary.

Approved:
LOMIS FITZHENRY.

Endorsed: Filed Jun. 21, 1928, S. T. Burnett, Clerk.

Entered July 21, 1928.

68 And afterwards, to wit: on the 21st day of July, A. D. 1928, the following further proceedings were had in said court in said cause and were entered of record to wit:

69 * * (Caption) * *

On motion of plaintiff-appellant by Josiah Whitnel, Esq., its solicitor, for good cause shown, it is ordered by the court that the time for filing transcript of record on appeal and docketing said cause in the United States Circuit Court of Appeals for the Seventh Circuit be, and the same is hereby extended for a period of thirty days from and after this date, to and including August 20th, A. D. 1928.

Dated this 21st day of July, A. D. 1928.

LOUIS FITZHENRY,
U. S. District Judge.

Enter

Endorsed: Filed Jul. 21, 1928. S. T. Burnett, Clerk.

65 And afterwards, to wit: on the 21st day of June, A. D. 1928, there was filed in the office of the clerk of the district court of the United States for the Southern District of Illinois, a certain Praecipe for Record, which said Praecipe for Record was in the words and figures, following, to wit:

66 * * (Caption) * * Filed June 21, 1928.

PRAECIPE.

To the Honorable S. T. Burnett, Clerk of the United States District Court, Southern District of Illinois:

You will please prepare a record in the above case, for appeal to the United States Court of Appeals, Seventh Circuit, including therein, the following:

1. Placita.
2. Bill of Complaint.
3. Plaintiff's Motion for Temporary Restraining Order.
4. Temporary Restraining Order.
5. Chancery Subpoena and return thereon.
6. Defendant's Motion to Dismiss.
7. All Orders and Decrees of Court.
8. Exception of plaintiff to Order of Court dismissing Bill and allowance of same.
9. Petition for Appeal and Order allowing same.
10. Assignment of Errors.
11. Appeal Bond and Order approving same.
12. Praecipe for Record.
13. Citation and acknowledgement thereon.

Dated this 20th day of June, A. D. 1928.

JOSIAH WHITNEL,
H. L. BROWNING,
Solicitors for Plaintiff.

67 UNITED STATES OF AMERICA,

In the United States District Court.

St. Louis Southwestern Railway Company, a corporation,
Plaintiff,
vs.
Louis L. Emmerson, Secretary of State of the State of Illinois.
Defendant.

JOSIAH WHITNEL, being first duly sworn on oath states: That on the 20th day of June, A. D. 1928, he delivered a copy of the foregoing "Praecipe for record" to M. B. L.

Catron, Assistant Attorney General of the State of Illinois, at Springfield, Illinois; that said B. L. Catron represented the defendant Loius L. Emmerson, as Secretary of State of the State of Illinois, in the foregoing cause.

Dated this 21st day of June, A. D. 1928.

JOSIAH WHITNEL.

Subscribed and sworn to before me this 21st day of June, A. D. 1928.

VIOLA MCDONNELL,
Notary Public.

(Notarial Seal)

Endorsed: Filed Jun. 21, 1928, S. T. Burnett, Clerk.

71 United States of America } ss:
Southern District of Illinois }

I, S. T. Burnett, Clerk of the United States District Court in and or the Southern District of Illinois, do hereby certify that the annexed and foregoing is a true and full copy of the original proceedings had of record and on file in the cause entitled St. Louis Southwestern Railway Company, a corporation vs. Louis L. Emmerson, Secretary of State of the State of Illinois, No. 800, in equity, prepared in accordance with praecipe filed therein, as fully as the same appear from the original files and records of said court in said cause now remaining in my custody and control.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Springfield this 28th day of July, A. D. 1928.

S. T. BURNETT
Clerk.

(Seal)

Endorsed: No. 800. Equity, United States District Court Southern District of Illinois St. Louis Southwestern Railway Company, a corporation. vs. Louis L. Emmerson, Secretary of State of the State of Illinois. Transcript of Record.

70 United States of America: ss

To: The President of the United States of America,

To: Louis L. Emmerson, as Secretary of State of the State of Illinois.

Greetings:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, Seventh Circuit, to be holden at the City of Chicago, Illinois, within thirty (30) days from the date hereof, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of Illinois, in a cause wherein the St. Louis Southwestern Railway Company is appellant and Louis L. Emmerson, Secretary of State of the State of Illinois is respondent, to show cause, if any there be, why the Decree in the said Appeal mentioned, should not be corrected, and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Louis FitzHenry, Judge of the District Court of the United States, for the Southern District of Illinois, this 21st day of June, A. D. 1928.

LOUIS FITZHENRY,
District Judge.

Service of the above citation acknowledged this 21st day of June, A. D. 1928.

B. L. CATRON,
Assistant Attorney General of the State of Illinois, and Solicitor for Respondent.

Endorsed: Filed Jun. 21, 1928, S. T. Burnett, Clerk.

Clerk's certificate to foregoing transcript omitted in printing.

[Caption omitted]

Appearances of counsel omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT

4075

ST. LOUIS SOUTHWESTERN RAILWAY CO.

vs.

LOUIS L. EMMERSON, Secretary of State of Illinois

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division

ORDER SETTING CAUSE—Oct. 2, 1928

It is ordered by the Court that this cause be, and the same is hereby, set down for hearing on Tuesday, October 30, 1928.

Minute entry of argument and submission October 30, 1928, omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM AND SESSION, 1928

No. 4075

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Appellant,

vs.

LOUIS L. EMMERSON, Secretary of State of the State of Illinois, Appellee

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division

Before Alschuler, Evans and Page, Circuit Judges

OPINION—Filed Jan. 2, 1929

EVANS, C. J.:

This appeal is from a decree dismissing appellant's bill for want of equity.

The relief sought in this suit was an injunctional decree restraining defendant from collecting a franchise tax, from imposing a penalty resulting from the non-payment of said tax, and from canceling plaintiff's right to transact business in Illinois.

The relief thus sought was based upon appellant's contention that section 105 and 107 of the General Corporation Act of Illinois were, as to appellant, unconstitutional and void, the contention being that these statutes are repugnant to section 1 of the fourteenth amendment of the Constitution of the United States as well as to section 2, clause 1, article 4, of said Constitution.

The statutes involved are set forth in the margin.*

*No. 105. Annual License Fee or Franchise Tax—Amount—Minimum—No Par Value Stock. Each corporation for profit, including railroads, except insurance companies, heretofore or hereafter organized under the laws of this state or admitted to do business in this state, and required by this act to make an annual report, shall pay an annual license fee or franchise tax to the Secretary of State of five cents on each one hundred dollars of the proportion of its issued capital stock, or amount to be issued at once, represented by business transacted and property located in this state, but in no event shall the amount of such license fee or franchise tax be less than that

Appellant is a Missouri corporation licensed to do business in Illinois. Its issued capital stock is of a par value of $36,249,750.00. Its property is located in various states, less than .0076 per cent is in Illinois. It filed its annual report with appellee whose duty it was to assess and collect a license or franchise tax determined by the sections above quoted. This tax was assessed at $1,000 and demand for its payment was duly made. Appellant offered to pay $135.21 but disputed appellee's right to demand the larger sum. The amount tendered ($135.21) was reached by applying the first part of section 105, the validity of which is not questioned. In short, appellant had $270,423.00 of its total assets located in Illinois. It offered to pay five cents on each one hundred dollars of property located in the state.

Appellee objects to the jurisdiction of the federal court and also insists that the bill does not specifically assail the constitutionality of section 105. In addition he argues that the statute violates no right guaranteed appellant by the constitution of the United States.

The first two contentions of appellee require no extended discussion.

---

required by this act of corporations having no property or business in this state.

"In the event that the corporation has stock of no par value, its shares, for the purpose of fixing such fee, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares."

No. 106. Ascertainment of License Fee or Franchise Tax in Case of Corporations Generally. In ascertaining the amount of the issued capital stock represented by business transacted and property located in this state, the sum of the business of any foreign or domestic corporation transacted in this state and the total property of such corporation located within this state shall be divided by the sum of the total business of the corporation, and the total property of the corporation wherever situated.

No. 107. * * * Basis in Case of Corporation Without Property in State and Doing No Business in State—Where Stock of No Par Value. In case it appears from the annual report that the corporation has no property located in this state, and is transacting no business in this state, the following fees shall be paid annually to the Secretary of State as an annual franchie tax: All such corporations having issued capital stock of $50,000 or less shall pay an annual fee of $10; corporations having issued capital stock of more than $50,000, but not exceeding $200,000, shall pay an annual fee of $14; corporations having issued capital stock of more than $200,000, but not exceeding $500,000, shall pay an annual fee of $20; corporations having issued capital stock of more than $500,000 but not exceeding $1,000,000, shall pay a fee of $50; corporations exceeding $10,000,000, shall pay a fee of $200; corporations having issued capital stock of more than $10,000,000, but not exceeding $20,000,000, shall pay a fee of $500; and all corporations having issued capital stock in excess of $20,000,000 shall pay an annual fee of $1,000."

The court had jurisdiction. Not only the tax of $1,000 but threatened penalties and appellant's right to continue to transact business in Illinois were involved. Appellant alleged this loss and damage to be $5,000.00. This was sufficient. Packard v. Banton, 264 U. S. 140; In re Heller Piano Co., 283 Fed. 904; McNichols v. International Typographical Union, 21 Fed. 497.

As to appellant's urge that the bill does not specifically attack the constitutionality of section 105, it is sufficient to say that the complaint will not be tested by any theory of the pleader or by any conclusions of law he may set forth in the complaint. Its sufficiency will be determined by the facts alleged, which alone must determine the plaintiff's right to relief.

So measured, we think plaintiff's bill sets forth facts sufficient to entitle it to the relief sought provided we conclude that the Illinois statutes upon which the tax is based are unconstitutional.

Appellee relies on the authority of General Signal Railway Company v. Virginia, 246 U. S. 500. Appellant, on the other hand, distinguishes this case on two grounds. It contends (a) that the validity of the statutes here under consideration involves the authority of the state to impose a tax upon a foreign corporation for continuing to do business therein whereas the General Signal Railway Company case involved a statute which imposed a tax on a foreign corporation and as a condition to its right to enter the state. Appellant also points out (b) that the Virginia statute under consideration in the General Signal Railway Company case contained a maximum tax provision whereas the last clause in section 105 of the Illinois statute contains what might be called a minimum provision.

An examination of Hanover Fire Ins. Co. v. Harding, 272 U. S. 494 makes it clear that there is a difference between imposing a tax on a foreign corporation about to enter the state and the imposition of an annual tax or license fee for the right to continue to do business in the state.

Even when dealing with the foreign corporation's right to enter the state, the legislature cannot place a burden upon the applicant that contravenes any right given it by the constitution of the United States.

For example, in International Paper Company v. Massachusetts, frequently cited with approval in later cases, (Air-Way Electric Appliance Corporation v. Day, Treasurer of the State of Ohio, 266 U. S. 71; Ozark Pine Line Corporation v. Monier, 266 U. S. 555; Alpha Portland Cement Company v. Massachusetts, 268 U. S. 203; Rhode Island Hospital Trust Company v. Rufus A. Doughton, 270 U. S. 69; Frost Trucking Co. v. R. R. Com., 271 U. S. 583) the court held as void and unconstitutional a statute imposing a tax upon a foreign corporation applying for admission to Massachusetts which was based upon the total capital of said corporation without, as well as within, the state of Massachusetts. In this opinion the court pronounced six definite and specific legal propositions which are most aidful in testing the authority of state legislatures to impose tax burdens on foreign corporations desirous of entering the state.

In the case of Looney v. Crane Company, 245 U. S. 178, the statute condemned dealt with franchise taxes imposed as a condition of the foreign corporation's continuing to do business.

Examining the statutes here under consideration for the purpose of applying the rule laid down in the aforesaid decisions, we find the subject matter of section 105 is "Annual License Fee or Franchise Tax—Amount—Minimum—No Par Value Stock." The last clause of the first sentence of this section makes applicable section 107, the title to which reads: "Basis in Case of Corporation Without Property in State and Doing No Business in State." The first sentence of section 105 exclusive of its last clause provided for the imposition of a tax based on the foreign corporation's property within the state. The state's right to thus tax the foreign corporation is not questioned by appellant. However, the state went further and added an additional tax such as provided in section 107 provided such tax exceeded the amount which the foreign corporation would be required to pay under the first part of section 105. The last clause of the first sentence of section 105 makes applicable section 107 and section 107 enlarges the tax which the foreign corporation would otherwise be required to pay.

Section 107, applied to foreign corporations such as appellant, imposes a tax on the basis of the foreign corpora-

tion's capital, without, as well as within, the state. This is what is condemned in International Paper Company v. Massachusetts, supra, and Looney v. Crane Company, supra.

It is true the additional burden imposed by the application of section 107 does not vary with each additional share. But the additional burden imposed upon appellant and all other corporations whose minimum under section 105 is exceeded by the application of 107 is based upon appellant's total capitalization, including property outside of the state. Such a burden the state cannot impose.

"The amount demanded is unimportant when there is no equitable basis for the tax." Alpha Portland Cement Co. v. Mass., 268 U. S. 180.

The decree is reversed with directions to enter one consistent with the views expressed in this opinion.

IN UNITED STATES CIRCUIT COURT OF APPEALS

4075

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

vs.

LOUIS L. EMMERSON, Secretary of State of the State of Illinois .

DECREE—Jan. 2, 1929

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Illinois, Southern Division, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby remanded to the said District Court with directions to enter a decree consistent with the views expressed in the opinion of this Court.

No. 4075

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

MOTION TO SUBSTITUTE PARTY APPELLEE

Now comes William J. Stratton, successor to Louis L. Emmerson, as Secretary of State of the State of Illinois, appellee in said cause, by Oscar E. Carlstrom, Attorney General, and moves the Court for leave to substitute his name in place of the name of said Louis L. Emmerson, as such Secretary of State, as the appellee in all further proceedings in said cause.

Oscar E. Carlstrom, Attorney General, Attorney for Appellee.

Petition for rehearing, covering 12 pages, filed January 22, 1929, omitted from this print. It was denied and nothing more by order February 21, 1929.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER SUBSTITUTING PARTY APPELLEE—Jan. 22, 1929

On motion of Mr. Oscar E. Carlstrom, counsel for appellee, it is ordered by the Court that William J. Stratton, Secretary of State of the State of Illinois be substituted as appellee in this cause in the place and stead of Louis L. Emmerson, Secretary of State of the State of Illinois.

Answer to petition for rehearing, covering seven pages, filed January 30, 1929, omitted from this print.

In United States Circuit Court of Appeals

[Title omitted]

Order Denying Petition for Rehearing—Feb. 21, 1929

It is ordered by the Court that the petition for a rehearing in this cause be, and the same is hereby denied.

In United States Circuit Court of Appeals

[Title omitted]

Petition for Appeal—Filed April 22, 1929

Considering himself aggrieved by the decision of the United States Circuit Court of Appeals for the Seventh Circuit in the above entitled cause, the appellee therein, now appellant, hereby prays that an appeal be allowed to the Supreme Court of the United States herein, and for an order fixing the amount of the bond thereon, if any be required.

Assignment of Errors

And the said appellant assigns the following errors in the record and proceedings in said cause:

1. The United States Circuit Court of Appeals for the Seventh Circuit erred in reversing the order and decree of the District Court of the United States for the Southern District of Illinois, Southern Division, in said cause.

2. The said United States Circuit Court of Appeals erred in directing the said District Court to enter a decree consistent with the views expressed in the opinion of the said Circuit Court of Appeals in said cause.

3. The said United States Circuit Court of Appeals erred in refusing to approve and affirm the order and decree of the said District Court dismissing the bill of complaint in said cause for want of equity.

4. The United States Circuit Court of Appeals erred in holding that the said bill of complaint in said cause set forth facts sufficient to entitle the plaintiff therein to the relief therein sought and prayed.

5. The said United States Circuit Court of Appeals erred in holding that Section 107 of the General Corporation Act of the State of Illinois, as applied to foreign corporations such as the plaintiff, imposes an invalid tax under the decisions of the Supreme Court of the United States.

6. The United States Circuit Court of Appeals erred in holding that said Section 107 of the General Corporation Act of Illinois imposes an unlawful burden upon the capital and/or property of the plaintiff outside of that State.

7. The said United States Circuit Court of Appeals erred in holding in effect that said Section 107 of the General Corporation Act of Illinois, as applied to the plaintiff under the provision of the last clause of Section 105 of said Act, is unconstitutional and void.

8. The said United States Circuit Court of Appeals erred in holding in effect that said Section 107 of the General Corporation Act of Illinois, as applied to the plaintiff pursuant to the provision of the last clause of Section 105 of said Act, imposes an illegal burden upon the interstate commerce of the plaintiff, and/or discriminates against it or takes its property without due process of law, contrary to the Commerce Clause of the Constitution of the United States, or the provisions of the Fourteenth Amendment.

9. The said United States Circuit Court of Appeals erred in refusing to hold that said Section 107 of the General Corporation Act of Illinois as applied to the plaintiff pursuant to the provisions of the last clause of Section 105 of said Act, does not violate any of the provisions of the Constitution of the United States or of the Fourteenth Amendment thereto, as alleged in the said bill of complaint.

Prayer for Reversal

For which said errors the appellee in said cause, now appellant herein, prays that the said judgment or decree of the

said United States Circuit Court of Appeals in the above entitled cause, be reversed and a judgment rendered therein in favor of this appellant, and for costs herein.

Oscar E. Carlstrom, Attorney General of Illinois, Counsel for Appellee, now Appellant. B. L. Catron, Assistant Attorney General, of Counsel.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER ALLOWING APPEAL—April 22, 1929

The appellee in the above entitled cause, now appellant herein, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States, from the judgment made and entered in said cause by the United States Circuit Court of Appeals for the Seventh Circuit, reversing the decree of the District Court of the United States for the Southern District of Illinois, Southern Division, in said cause, and from each and every part thereof, and having presented and filed his petition for appeal, assignment of errors and prayer for reversal, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided;

It is now here ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the United States Circuit Court of Appeals for the Seventh Circuit in this cause, as provided by law;

And it is further ordered that the Clerk of this Court shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same within 30 days of this date.

And it is further ordered that security for costs on appeal herein be fixed in the sum of Five Hundred Dollars.

In United States Circuit Court of Appeals

[Title omitted]

Præcipe for Transcript of Record—Filed April 22, 1929

To the Honorable Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit:

You will please prepare a transcript of the record in the above entitled case for appeal to the Supreme Court of the United States and include therein the following, to wit:

1. Transcript of the record and proceedings in said cause in the District Court of the United States for the Southern District of Illinois, Southern Division, filed in your office upon the appeal from said Court.
2. Opinion and judgment of the said United States Circuit Court of Appeals in said cause.
3. Petition for rehearing in said cause.
4. Order denying petition for rehearing.
5. Petition for Appeal to the Supreme Court of the United States with assignment of errors and prayer for reversal.
6. Order allowing appeal and appeal bond.
7. Citation and return thereon.
8. All other orders and proceedings of said United States Circuit Court of Appeals in said cause.

Dated this 22nd day of April, A. D. 1929.

Oscar E. Carlstrom, Attorney General of Illinois, Counsel for Appellant. B. L. Catron, Assistant Attorney General, of Counsel.

[File endorsement omitted.]

Bond on appeal for $500.00, approved and filed April 29, 1929, omitted in printing.

Clerk's certificate to foregoing transcript omitted in printing.

Citation, in usual form, showing service on H. L. Browning et al., filed April 29, 1929, omitted in printing.

IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed May 20, 1929.

Comes now the appellant in the above entitled cause and states that he adopts his assignments of error as his statement of the points upon which he intends to rely in this Court in this case.

And the appellant further states and represents that the whole of the record in said cause, as filed herein, is necessary for the consideration of the case in this Court.

Oscar E. Carlstrom, Attorney General of the State of Illinois, Counsel for Appellant. B. L. Catron, Assistant Attorney General, of Counsel.

Proof of Service

STATE OF ILLINOIS,
Sangamon County, ss:

Charles E. Long, being first duly sworn upon his oath, states that he is an Attache of the office of the Attorney General of the State of Illinois, and that on the 17th day of May, A. D. 1929, he deposited in the Post Office at Springfield, Illinois, postage fully prepaid, a copy of the statement of points to be relied upon and designation of the parts of the record to be printed in the above entitled cause in said Court, addressed to Josiah Whitnel and H. L. Browning, Attorneys at Law, First National Bank Building, East St. Louis, Illinois, they being Counsel of Record for the appellee in said cause.

Charles E. Long.

Subscribed and sworn to before me this 17th day of May, A. D. 1929. Coy N. Overaker, Notary Public. (Seal Coy N. Overaker, Notary Public, Sangamon County).

[File endorsement omitted.]

Endorsed on cover: File No. 34,223. United States Circuit Court of Appeals, Seventh Circuit. Term No. 98. William J. Stratton, Secretary of State of the State of Illinois, appellant, vs. St. Louis Southwestern Railway Company. Filed May 20th, 1929. File No. 34,223.

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FILE COPY

Office Supreme Court
FILED
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CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. [redacted] 6

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, A CORPORATION, APPELLEE,

v.

WILLIAM J. STRATTON, SECRETARY OF STATE OF THE STATE OF ILLINOIS, APPELLANT.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

STATEMENT AS TO JURISDICTION ON APPEAL.

OSCAR E. CARLSTROM,
Attorney General of Illinois,
Counsel for Appellant.

BAYARD LACEY CATRON,
Assistant Attorney General,
Of Counsel for Appellant.

PHILLIPS BROS.' PRINT.
SPRINGFIELD, ILLINOIS.

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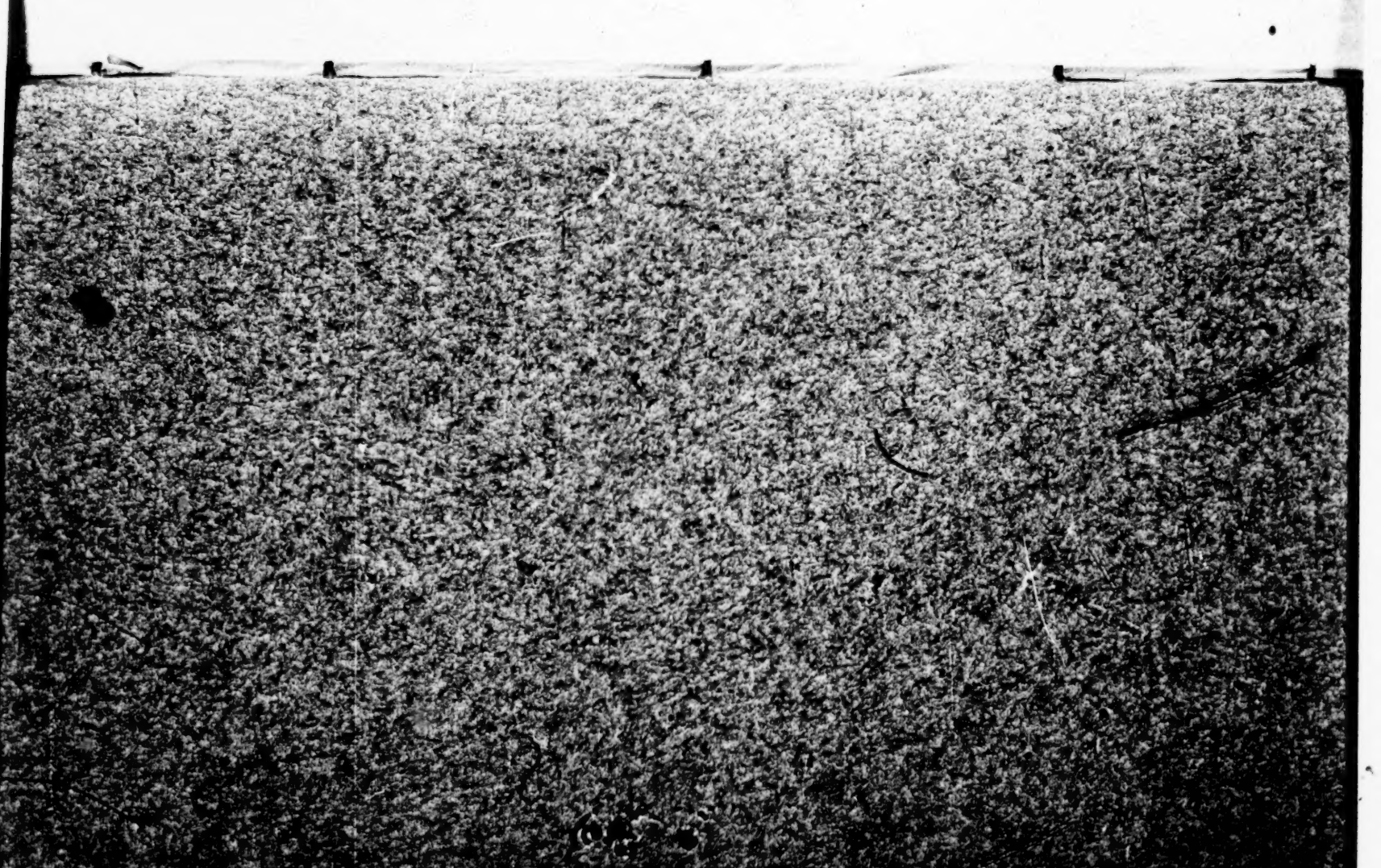

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 914

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, A CORPORATION, APPELLEE,

v.

WILLIAM J. STRATTON, SECRETARY OF STATE OF THE STATE OF ILLINOIS, APPELLANT.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

STATEMENT AS TO JURISDICTION ON APPEAL.

MAY IT PLEASE THE COURT:

The appellant, in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represents:

I.

Statutory Provision Sustaining Jurisdiction.

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938 (United States Code, Title 28, Section 347-b), provides that Section 240 of the Judicial Code is amended to read in part as follows:

> Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case.

II.

Date of Decree and Date of Application for Appeal.

The decree sought to be reviewed was entered on the 2nd day of January, 1929 (R.-CCA.9[1]); and petition for rehearing was denied on the 21st day of February, 1929 (R.-CCA-34).

The application for appeal, with assignments of error and prayer for reversal, was presented on the 22nd day of April, 1929 (R.-CCA. 34).

[1]All references to R.-CCA. are to the pages of the certified unprinted record prepared by the Clerk of the United States Circuit Court of Appeals and on file with the Clerk of this Court. The record has not yet been printed.

III.

Nature of Case and Ruling Below.

The St. Louis Southwestern Railway Company, a corporation organized under the laws of the State of Missouri and authorized to do business in the State of Illinois, filed its bill in the District Court of the United States for the Southern District of Illinois, to enjoin the Secretary of State of the State of Illinois from assessing and collecting an annual franchise tax against it under Section 107 of the General Corporation Act of Illinois, which provides for a minimum tax based on the total issued capital stock, with a maximum limit in amount, which was applied to the complainant pursuant to the last clause of Section 105 of said Act (R.-DC 2-3[2]).

The bill alleges that the tax as assessed by the Secretary of State under Section 107 of said Act would place an unreasonable burden on interstate commerce and deprive the complainant of its privileges and immunities as a citizen, under paragraph 3 of Section 8 and Section 10 of Article I, and Section 2 of Article IV, respectively, of the Constitution of the United States, and would also deny the complainant the equal protection of the law and deprive it of its property

[2]All references to R.-DC are to the pages of the printed transcript of the record of proceedings in the District Court, used in the appeal to the Circuit Court of Appeals, and now on file with the Clerk of this Court as the first part of the record herein.

without due process of law, all in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States (R.-DC 5, 7).

Upon motion of the complainant, a temporary restraining order was entered enjoining the defendant Secretary of State from enforcing the penalties provided by said Act against the complainant on account of its failure to pay said license fee or tax, as prayed in its bill (R.-DC 28-9). Thereafter, the Secretary of State filed a motion to dismiss the said bill of complaint for want of equity (R.-DC 29). Upon the hearing thereon, the District Court in a written opinion upheld the said provisions of said Act as constitutional (R.-DC 30-37), and entered a decree dismissing the said bill for want of equity (R.-DC 37-8); thereupon, the complainant assigned as error the refusal of said Court to hold said Sections 105 and 107 as invalid on the constitutional grounds above stated (R.-DC 40), and perfected an appeal to the United States Circuit Court of Appeals for the Seventh Circuit (R.DC 41).

The said Circuit Court of Appeals held in a written opinion that the State could not assess a tax on the complainant under said Section 107, on the ground that it imposed an unconstitutional tax on the basis of the capital of the foreign corporation, without as well as within the State, in the manner condemned by this Court in the cases of *International Paper Co.* v.

Massachusetts, 246 U. S. 135, and *Looney* v. *Crane Co.*, 245 U. S. 178, and also held in substance that the application of said Section 107 to the appellant there would impose an unlawful burden upon its interstate commerce and take its property without due process of law (R.-CCA 8). That Court thereupon entered a judgment reversing the decree of the District Court and remanding the cause to that Court with directions to enter a decree consistent with the views expressed in the opinion of said Court of Appeals (R.-CCA 9). The said Secretary of State then presented and filed a petition for rehearing (R.-CCA 9), which upon consideration was denied by that Court on February 21, 1929 (R.-CCA 34).

The Secretary of State thereupon presented a petition for appeal to this Court, with assignments of error alleging among other things that the said Circuit Court of Appeals erred in reversing the decree of said District Court and directing that court to enter a decree consistent with the views expressed in said opinion, and in refusing to approve and affirm the decree of said District Court; and also, in holding that said Section 107 imposed an unconstitutional and invalid tax on the said corporation under the decisions of this Court, placed an unlawful burden on its capital and/or property outside the State, imposed an illegal

burden upon its interstate commerce, and/or discriminated against it or took its property without due process of law (R.-CCA 35-6).

The Circuit Court of Appeals thereupon entered an order allowing such appeal to this Court (R.-CCA 36-7), upon the giving of a bond for costs, which was duly filed and approved (R.-CCA 38-9). A citation was then issued to the appellee corporation returnable in thirty days, service of which was duly acknowledged by the attorneys for appellee (R.-CCA 40-2), and such citation and return, with the transcript of the Record, was filed within such time with the Clerk of this Court.

IV.

Cases Believed to Sustain Jurisdiction.

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Gulf Refining Co. v. *United States,* 269 U. S., 125, 135-6;
Moore v. *N. Y. Cotton Exchange,* 270 U.S., 593, 603;
North Carolina R. R. Co. v. *Story,* 268 U. S., 288, 291;
Moody v. *Century Bank,* 239 U. S., 374, 376;
Chesapeake & Potomac Tel. Co. v. *Manning,* 186 U. S., 238, 240;
Mower v. *Fletcher,* 114 U. S., 127, 128;
Board of Comrs. v. *Lucas, Treasurer,* 93 U. S., 108, 110, 113;
Forgay v. *Conrad,* 6 *How.* 201, 203 (47 U. S.);
Bronson v. *Railroad Co.,* 2 Black 524, 529, 531;
Whiting v. *Bank of United States,* 13 Peters 15.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of Section 240 of the Judicial Code as amended by the Act of February 13, 1925, (now Section 347b), and as further amended or modified by the Act of January 31, 1928.

Respectfully submitted,

OSCAR E. CARLSTROM,
Attorney General of Illinois,
Counsel for Appellant.

BAYARD LACEY CATRON,
Assistant Attorney General,
Of Counsel for Appellant.

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CHARLES ELMORE
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1929.

No. 36

WILLIAM J. STRATTON, Secretary of State of the State of Illinois,

Appellant,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, a Corporation,

Appellee.

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

STATEMENT, BRIEF AND ARGUMENT FOR APPELLANT.

Oscar E. Carlstrom,
Attorney General of Illinois,
Counsel for Appellant.

Bayard Lacey Catron,
Assistant Attorney General,
Of Counsel for Appellant.

PHILLIPS BROS.' PRINT.
SPRINGFIELD, ILLINOIS.

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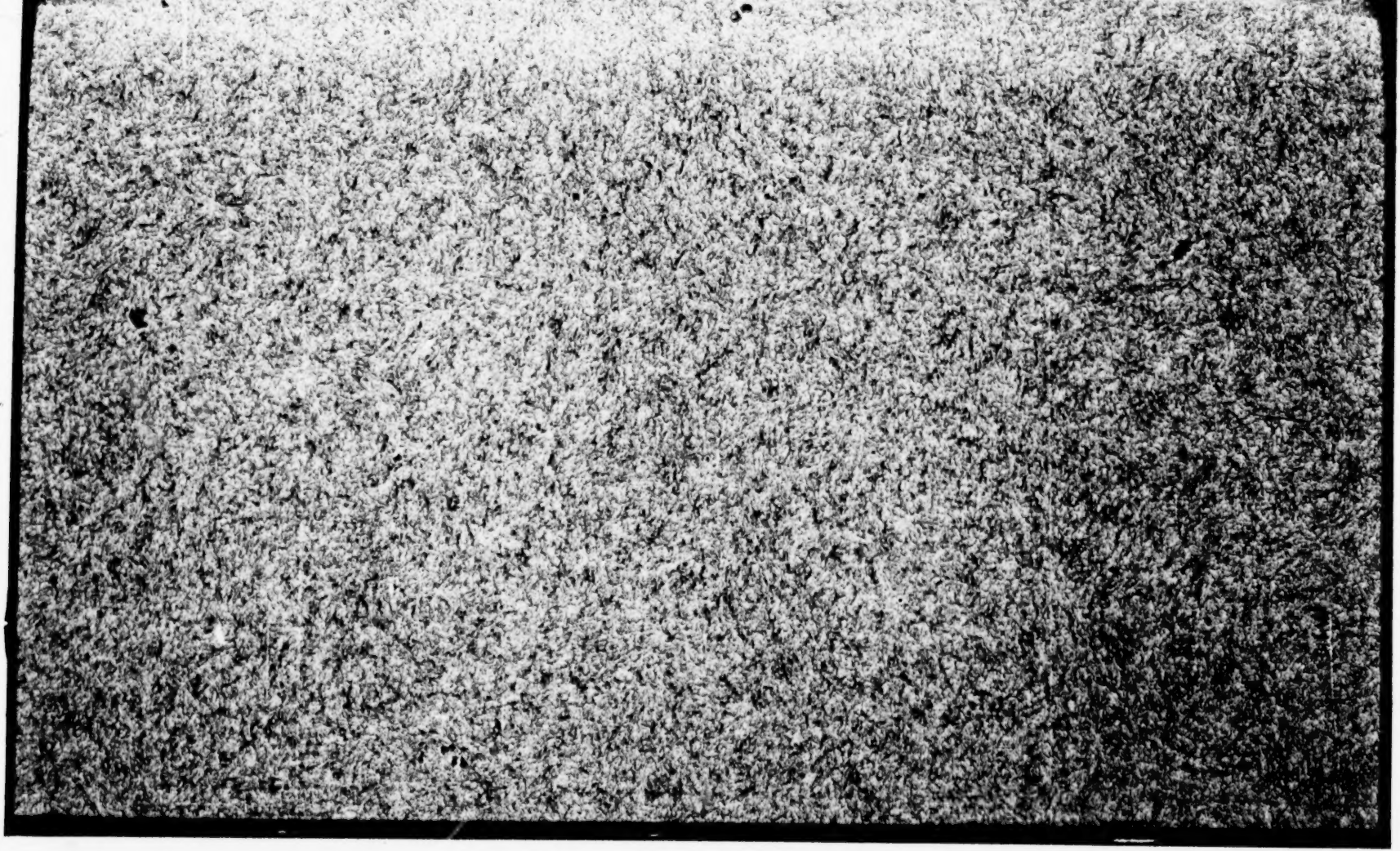

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1929.

No. 98

WILLIAM J. STRATTON, Secretary of State of the State of Illinois,

Appellant,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, a Corporation,

Appellee.

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

STATEMENT, BRIEF AND ARGUMENT FOR APPELLANT.

STATEMENT OF THE CASE.

May it Please the Court:

This is an appeal from a decision of the United States Circuit Court of Appeals for the Seventh Circuit,

reversing a decree of the District Court of the United States for the Southern District of Illinois, and remanding the cause to that Court with directions to enter a decree consistent with the views expressed in the opinion of said Circuit Court. That opinion appears at pages 52-56 of the printed transcript of the record. The opinion of the District Court sustaining the motion of appellant to dismiss the bill of complaint for want of equity is set forth at pages 30–36 of the record.

Appellant has filed a statement as to jurisdiction of the appeal herein, and this Court found that it had probable jurisdiction of such appeal on October 28, 1929.

The appellee herein, St. Louis Southwestern Railway Company, is a corporation organized under the laws of the State of Missouri and has been authorized to do business in the State of Illinois. The annual report filed by it with the Secretary of State in February, 1927, showed that its authorized capital stock was $130,000,000, of which $36,249,750 was actually issued and outstanding. It was engaged in both intrastate and interstate transportation of freight and passengers as a common carrier. The total value of its property was $75,793,697.78, and its total business during the year 1926 amounted to $18,201,955.32. The total length of its railroad track in all states was 940.58 miles. The value

of its property in Illinois was $786,196, and the business transacted by it in that State in 1926 amounted to $2,868.36 (R. 2–3, 11–13).

Section 102 of the Illinois Corporation Act requires both domestic and foreign corporations, including railroads, to make a report in writing to the Secretary of State in February of each year on forms furnished by him. The report relating to property and business is made for the preceding calendar year and is required to disclose such facts as to enable him to ascertain the proportion of capital stock represented by business transacted and tangible property located in that State, in order to assess the annual license fee or franchise tax and such assessment is then made by him for the next year beginning July 1. Sections 105 and 107 of said Act provide for the payment of the fee or tax so assessed as follows:

> Section 105. Each corporation for profit, including railroads, except insurance companies, heretofore or hereafter organized under the laws of this State or admitted to do business in this State, and required by this act to make an annual report, shall pay an annual license fee or franchise tax to the Secretary of State of five cents on each one hundred dollars of the proportion of its issued capital stock, or amount to be issued at once, represented by business transacted and property located in this state, **but in no event shall the amount of such license fee or franchise tax be less than that required by this act of corporations having no property or business in this state.**

Section 107. In case it appears from the annual report that the corporation has no property located in this state, and is transacting no business in this state, the following fees shall be paid annually to the Secretary of State as an annual franchise tax: All such corporations having issued capital stock of $50,000 or less shall pay an annual fee of $10; corporations having issued capital stock of more than $50,000, but not exceeding $200,000, shall pay an annual fee of $15; corporations having issued capital stock of more than $200,000, but not exceeding $500,000, shall pay an annual fee of $20; corporations having issued capital stock of more than $500,000, but not exceeding $1,000,000, shall pay a fee of $50; corporations having issued capital stock of more than $1,000,000, but not exceeding $10,000,000, shall pay a fee of $200; corporations having issued capital stock of more than $10,000,000, but not exceeding $20,000,000, shall pay a fee of $500; **and all corporations having issued capital stock in excess of $20,000,000 shall pay an annual fee of $1,000.**

From the report filed by appellee, as above stated, it appeared that if its annual license fee or franchise tax were computed at the rate specified in said Section 105 on the proportion of issued capital stock actually represented by property and business in Illinois during the preceding year, it would amount to only the sum of $135.21. Therefore, pursuant to the last clause of Section 105, the Secretary of State assessed the required minimum fee specified in Section 107 against appellee, being the maximum amount of $1,000 provided by that Section for corporations having issued capital stock in excess of $20,000,000 (Abst. 3–5).

On July 21, 1927, appellee filed its bill of complaint in said District Court to enjoin the collection of the tax assessed against it, on the alleged ground that such a tax would place an unreasonable burden upon interstate commerce and deprive appellee of its privileges and immunities as a citizen under paragraph 3 of Section 8, and Section 10 of Article I, and Section 2 of Article IV, respectively, of the Constitution of the United States, and would also deny it the equal protection of the laws and deprive it of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States (R. 5–8).

The appellant filed a motion to dismiss the bill of complaint for want of equity and upon the hearing, the District Court allowed the motion and entered a decree dismissing the bill, pursuant to a written opinion which upheld the provisions of said Act as constitutional (R. 30-38). From this decree, appellee appealed to said Circuit Court, which held in substance that said Section 107 would impose an unlawful burden upon the interstate commerce of appellee and take its property without due process of law, and therefore reversed the decree of the District Court and directed it to enter a decree consistent with the views stated. The petition of appellant for rehearing was denied and an appeal was then taken by him to this Court (R. 52–58).

All of the errors assigned are specified and relied upon by appellant for reversal. In substance they urge that said Circuit Court erred in reversing the decree of the District Court and directing it to enter a decree consistent with the views expressed by the Circuit Court, and in refusing to approve and affirm the decree of the District Court; that the Circuit Court erred in holding that said Section 107, as applied to foreign corporations such as appellee, imposes an invalid tax under the decisions of this Court, or an unlawful burden upon the capital and property of appellee outside the State of Illinois, or an illegal burden upon its interstate commerce, or discriminates against it or takes its property without due process of law, contrary to the commerce clause of the Constitution or the Fourteenth Amendment; and in refusing to hold that said Section 107, as applied to appellee, pursuant to the last clause of Section 105 of said Act, does not violate any provision of the Federal Constitution or the Fourteenth Amendment thereto (R. 58-60).

Briefly stated, the position of appellant is that the Illinois Corporation Act requires all corporations organized or admitted to do business in that State and making an annual report, to pay annually at least the minimum fees specified in Section 107 of said Act, as an excise or

franchise tax for the right or privilege granted of doing business in that State from year to year; and in case the privilege is actually exercised to such an extent that the proportion of issued capital stock of any such corporation represented by business transacted and property located in that State would produce a larger fee or tax at the rate specified in said Section 105, then such larger fee or tax shall be paid by such corporation for the privilege exercised by it in that State, and that such requirements do not violate any of said provisions of the Federal Constitution or the Fourteenth Amendment thereto.

SUMMARY OF ARGUMENT.

I.

The Minimum Fee Provisions of the Illinois Corpotion Act are reasonable and valid.

The provisions of the Act which require all corporations organized or admitted to do business in Illinois to pay annually a minimum license fee or franchise tax, which is graduated to some extent upon the amount of issued capital stock and is limited to the specified maximum amount of tax, fix a reasonable excise or franchise tax for the privilege granted and do not violate any constitutional provision.

General Railway Signal Co. v. *Virginia*, 246 U. S., 500, 511;
Cheney Bros. Co. v. *Massachusetts*, 246 U. S., 147, 154-8;
Kansas City Ry. Co. v. *Kansas*, 240 U. S., 227, 232-5;
Baltic Mining Co. v. *Massachusetts*, 231 U. S., 68, 82-7;
Postal Tel. Cable Co. v. *Adams*, 155 U. S., 688, 698.

II.

The Statute does not impose an unlawful burden upon the Interstate Commerce of Appellee.

The statute and the tax imposed in this case conform to the rule adopted by this Court that, while the State may not regulate interstate commerce or impose burdens upon it, it is authorized to levy a tax within its authority,

measured by the capital stock in part used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character.

Hump Hairpin Mfg. Co. v. *Emmerson*, 258 U. S., 290, 294;
Underwood Typewriter Co. v. *Chamberlain*, 254 U. S., 113, 120;
United States Glue Co. v. *Oak Creek*, 247 U. S., 321, 326;
Peck & Co. v. *Lowe*, 247 U. S., 165, 173-5;
Kansas City M. & B. R. R. Co. v. *Stiles*, 242 U. S., 111, 119;
Kansas City, etc., Ry. Co. v. *Kansas*, 240 U. S., 227, 234.

III.

The United States Circuit Court of Appeals apparently misconceived the nature of the tax and its effect upon the business and property of appellee.

Opinion of Circuit Court, Record pp. 52-56;
Bill of Complaint, Record pp. 2-4, 11-13;
General Railway Signal Co. v. *Virginia*, 246 U. S., 500, 511;
Looney v. *Crane Co.*, 245 U. S., 178, 189-190;
International Paper Co. v. *Massachusetts*, 246 U. S., 135, 143-5;
Hanover Fire Ins. Co. v. *Harding*, 272 U. S., 494;
Postal Tel. Cable Co. v. *Adams*, 155 U. S., 688, 698.

IV.

The District Court in its decision construed the statute correctly and properly dismissed the bill of Complaint for want of equity.

Memorandum of Views of District Court, Record pp. 30-36;
General Railway Signal Co. v. *Virginia*, 246 U. S., 500, 511;

Cases distinguished:

International Paper Co. v. *Mass.*, 246 U. S., 135, 143-5;
Western Union Tel. Co. v. *Kansas*, 216 U. S., 1;
Looney v. *Crane Co.*, 246 U. S., 178, 189-190.

ARGUMENT.

I.

The Minimum Fee Provisions of the Illinois Corporation Act are reasonable and valid.

The bill of complaint in this case clearly shows that appellee was required, pursuant to the last clause of Section 105, to pay the minimum franchise tax specified in Section 107 of the Act for the privilege of doing business in the State, inasmuch as appellee did not have a sufficient proportion of its property and business in this State to make it subject to a higher tax under the rate specified in Section 105.

The real question in this case is, whether or not the State may require a corporation organized or admitted to do business in the State, to pay a minimum fee or franchise tax, as provided in Sections 105 and 107, for granting the privilege to it of doing business in the State during the year, although it may not actually exercise its franchise in the State to a sufficient extent to produce such amount of tax at the rate specified in Section 105.

Sections 105 and 107 of the Corporation Act should be considered and construed together. The effect of both sections is to require every corporation, which desires to maintain the right or privilege of transacting

local business in the State, to pay at least the fee specified in Section 107, based within limits on the amount of issued capital stock which it may use in the State. Furthermore, if the rate specified in Section 105, applied to the proportion of the capital stock actually represented by its property and business in the State will produce a larger tax, then such larger tax must be paid. In such case, the fee is increased in proportion to the exercise of the privilege by the corporation.

The principle of a franchise tax imposed upon the basis of the minimum fee provisions of Sections 105 and 107 of this Act has been upheld by this Court in several cases. In *General Railway Signal Co.* v. *Virginia,* 246 U. S., 500, the statute of Virginia imposed a franchise tax for authority to do business in the State, which was graduated to some extent upon the amount of authorized capital stock, the fee being $1,000 for all corporations having an authorized capital stock of $1,000,000 to $10,000,000. The corporation in that case had an authorized capital stock of $5,000,000 and was therefore required to pay a tax of $1,000 for the privilege of being allowed to perform a single contract in the State which amounted to $85,597. The Court held that such a tax was not arbitrary or unreasonable and did not impose any burden upon interstate commerce.

In the case of *Kansas City, Ft. Scott & Memphis R. R. Co.* v. *Kansas,* 240 U. S., 227, the statute imposed a graduated franchise tax upon corporations, with a maximum limit of $2,500 on capital stock amounting to over $5,000,000. The Court again held that such a tax was reasonable and did not impose a burden upon interstate commerce, or violate the due process or equal protection provisions of the Fourteenth Amendment, although a large part of the property and business of that corporation was outside the State.

In the case of *Baltic Mining Co.* v. *Massachusetts,* 231 U. S., 68, the statute imposed a tax of 1/50 of 1% of the authorized capital stock of foreign corporations for the privilege of doing a local business in that State, with a maximum limit of $2,000 on a capital stock of $10,000,000 or more. The Court held that in view of the limitation and conditions, such a tax was reasonable and did not necessarily burden interstate commerce or deny the equal protection of the laws to foreign corporations engaged in interstate commerce.

The Court again approved the Massachusetts statute in *Cheney Bros. Co.* v. *Massachusetts,* 246 U. S., 147, in the case of a foreign corporation doing business in that State, and also engaged in interstate commerce. After the maximum limit of the tax was removed by that State, and the tax was computed on the entire authorized cap-

ital stock, however, the Court held the statute invalid in the case of *International Paper Co.* v. *Massachusetts*, 246 U. S., 135, on the ground that it thus imposed an unreasonable burden upon interstate commerce and taxed property outside of the State.

The latter case followed the decision in *Looney* v. *Crane Co.*, 245 U. S., 178, in which the corporation had been admitted into the State in 1905, upon payment of a fee which was limited to $200 for a permit to do business for ten years, and thereafter paid an annual franchise tax until the permit was about to expire in 1915. During that time the maximum limit on the permit tax had been removed, thus extending the tax to the entire authorized capital stock. The annual franchise tax was also computed on that basis, or on the issued stock, surplus and undivided profits, in case they exceeded the amount of authorized stock. The Court held the statute invalid as to both the permit tax and the annual franchise tax, on the ground that it then imposed a tax upon the entire authorized stock or capital of the corporation, without any limitation on the amount of the tax.

The Court in that case and also in the *International Paper Company* case expressly distinguished the other cases cited (*Baltic Mining Co.* v. *Massachusetts*, 231 U. S., 68; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S., 350; *Kansas City, Fort Scott & Memphis Ry. Co.* v. *Kansas*, 240 U. S., 227; *Kansas City, Memphis &*

Birmingham R. R. Co. v. *Stiles,* 242 U. S., 111). In those cases, the Court approved statutes which contained provisions qualifying or restricting their operation and effect, such as the subject matter on which the tax was levied, or limitations on the amount of the tax, which restricted it to a reasonable maximum amount for the privilege granted, as in the present case. Those cases are directly applicable here and sustain the tax imposed in this case.

The present case is unlike *Cudahy Packing Co.* v. *Hinkle,* 278 U. S., 460, in which the tax was computed upon the entire authorized capital stock, although only two-thirds of such stock had been issued and the total value of the property did not exceed the amount of issued stock. The State there imposed both an additional permit or admission tax and the annual franchise tax upon the basis of the entire authorized capital stock, and the maximum limit with respect to both kinds of taxes was three times as great as the maximum limit upon the privilege tax in the present case.

These essential and substantial differences in the basis and extent of the tax as imposed in the *Cudahy* case clearly distinguish it and afford proper ground for a different conclusion in the present case. The tax here imposed is strictly a franchise tax for the privilege granted of doing a local business as a corporation in the

State. The amount provided is very reasonable in proportion to the issued capital stock in the several gradations which may be used, and likewise is limited to a comparatively small maximum amount. If such a reasonable excise or franchise tax may not be imposed for the privilege granted, then a foreign corporation may be admitted to do business in this State upon the payment of a trifling amount in the first instance, and may thereafter maintain the right or privilege of doing business in the State from year to year perpetually without any further payment, regardless of the value of the privileges granted by the State and maintained by the corporation.

In this case, appellee admittedly carried on a local business in Illinois and had a substantial amount of its property within the State. Furthermore, it had the privilege of increasing the amount of its property and business in that State during the next year without paying any additional tax, until the application of the rate specified in Section 105 would produce an amount in excess of the minimum tax provided by Section 107 of the Act. The fee charged was an excise or franchise tax for the privilege granted, and was not a tax on property outside the State. There was a reasonable relation between the charge and the privilege granted, which applied to all corporations alike under the same circumstances.

II.

The Statute does not impose an unlawful burden upon the Interstate Commerce of Appellee.

This Court has frequently held that a franchise tax on corporations cannot be held to be repugnant to the commerce clause of the Constitution, merely because it is measured by the capital stock of such corporations. The rule applicable in such cases was clearly stated by the Court in the case of *Hump Hairpin Mfg. Co.* v. *Emmerson,* 258 U. S., 290. The Court there upheld a franchise tax which was assessed under the Illinois statute against a foreign corporation, and which was computed upon the entire authorized capital stock, although more than nine-tenths of the business transacted consisted of sales made in interstate commerce. In considering the validity of the statute and the tax assessed, the Court said, at page 294:

> "While a state may not use its taxing power to regulate or burden interstate commerce (citing cases), on the other hand it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating Federal constitutional rights. * * *
>
> The turning point of these decisions is whether, in its incidence, the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon it, or whether it affects it only incidentally or remotely, so that the tax is not in reality a burden, al-

though in form it may touch, and in fact distantly affect it."

This question was also fully considered in the case of *Kansas City Ry. Co.* v. *Kansas*, 240 U. S., 227, in which an annual graduated tax with a maximum limit was computed upon the issued capital stock of a railway corporation engaged in interstate commerce. After holding that the State would not be barred from imposing a tax upon the privilege granted, merely because the corporation is engaged in interstate as well as intrastate commerce, the Court said, at page 232–3:

> "And agreeably to the principle above mentioned, it has never been and cannot be maintained that an annual tax upon this privilege is in itself and in all cases, repugnant to the Federal power merely because it is measured by the authorized or paid up capital stock. The selected measure may appear to be simply a matter of convenience in computation and may furnish no basis whatever for the conclusion that the effort is made to reach subjects withdrawn from the taxing authority."

Likewise, in the case of *Kansas City M. & B. R. R. Co.* v. *Stiles*, 242 U. S., 111, in which a franchise tax was measured by the entire capital stock of a consolidated railroad company, it was urged that the statute was void because it taxed property outside the State and imposed a direct burden upon interstate commerce. After referring to the discussion of those questions in the above case and stating that it was there held that the State might measure a tax within its authority by capital stock

which in part represented property beyond the taxing power of the State, the Court further said, at page 119:

> "So of the objection that the tax imposes a burden upon interstate commerce, the test of validity recognized in previous cases and repeated in *Kansas City, etc., Railway Co.* v. *Kansas, supra,* is the nature and character of the tax imposed. The State may not regulate interstate commerce or impose burdens upon it; but it is authorized to levy a tax within its authority, measured by capital in part used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character. In the present case, the franchise tax is imposed upon the capital stock of a corporation consolidated under the state law, and engaged in both interstate and intrastate commerce. We find nothing in the amount or character of the tax which makes it a burden upon interstate commerce and so beyond the authority of the state to impose."

The same principle applies in the case of a franchise tax measured by the net profits of a corporation. In *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S., 113, an annual franchise tax was imposed by the State of Connecticut upon a foreign corporation, under a formula which allocated 47 per cent of its profits to that State, although only a little over three per cent of such profits were made from sales in the state. It was therefore contended that the tax burdened its interstate commerce and business in other states. The Court held, however, that a tax measured by such profits was entirely valid, although derived in part or mainly from interstate commerce. The Court applied the same principle with

respect to franchise taxes measured by net profits in the cases of *United States Glue Co.* v. *Oak Creek,* 247 U. S., 321, and *Peck & Co.* v. *Lowe,* 247 U. S., 165.

This Court has specifically upheld statutes very similar to that involved in the present case, even though in some cases, as in *General Railway Signal Co.* v. *Virginia,* 246 U. S., 500, and other cases, the tax was measured by the authorized instead of issued capital stock, with a maximum limit in the amount of the tax. The difference in the principle of a statute which measures a tax by authorized instead of issued stock, when applied to a corporation having a substantial amount of unissued stock, however, may well account for the contrary decision in the case of *Cudahy Packing Co.* v. *Hinkle, supra.* That difference in connection with the very reasonable limitation in the amount of the tax in the present case would seem to be entirely sufficient to sustain the validity of the statute and the tax imposed in this case.

The application of the statute to appellee in the present case certainly cannot be considered as imposed for the purpose or as having the effect of defeating Federal constitutional rights. Neither can the tax imposed affect interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of or restraint or burden on such commerce. The statute is clearly designed and intended to impose only a reason-

able minimum charge upon all corporations, both foreign and domestic, for maintaining the privilege granted of doing a local business in the State during the next ensuing year, and of exercising such privilege to a limited extent if desired, without any additional charge for so doing. It seems clear that the statute, as so intended and as applied in this case, cannot be deemed to violate the commerce clause of the Federal Constitution.

III.

The United States Circuit Court of Appeals apparently misconceived the nature of the Tax and its effect upon the Business and Property of Appellee.

The opinion of the Circuit Court of Appeals in this case indicates that the Court believed the tax should be in the nature of a property tax, rather than an excise or franchise tax. This is illustrated by the remark of the Court, after stating that appellant (appellee here) offered to pay the amount obtained by applying the first part of Section 105: "In short, appellant had $270,423 of its total assets located in Illinois. It offered to pay five cents on each one hundred dollars of property located in the State." (R. 53).

The amount mentioned by the Court was in reality the alleged amount or proportion of the issued capital capital stock of appellee represented by both property and local business in this State. As a matter of fact, the

actual amount of tangible property or assets which appellee had in Illinois amounted to $786,196. This amount, together with the local business transacted in the State the preceding year, which was given as $2,868.36, made a total amount of $789,064.36 of tangible property and business in the State, as stated in the bill and shown by the copy of report attached to the bill (R. 3, 12).

If the privilege tax had been computed at the statutory rate specified in Section 105 on the property admitted to be used in the State, it would have been about three times the amount admitted to be due, without considering the amount of local business transacted in the State. The tax here imposed, however, is an excise or franchise tax for the privilege granted of doing a local business in the State, and the tax is not based upon the amount of property or assets in the State, under either Section 105 or 107 of the Act.

The Court also appears to have approved the distinction which appellee sought to make in the case of *General Railway Signal Co.* v. *Virginia*, 246 U. S., 500. The tax imposed in that case was apparently a tax upon the right to enter and to do business in the State. The tax here imposed is an excise or franchise tax for the renewal of the privilege granted to do business in the State during the next year. There is no essential difference in the character of the tax imposed in the two cases,

and no such distinction was made by this Court in the case of *Looney* v. *Crane Co.*, 245 U. S., 178, which involved the renewal of a permit tax, as well as an annual franchise tax.

The second point of alleged distinction, that the *General Railway Signal Co.* case contained a maximum tax provision, whereas the last clause in Section 105 of the Illinois Act contains a minimum provision, ignores the maximum tax provision or limit of $1,000 in Section 107, which was applied in this case. This is exactly the same in substance and effect as the Virginia statute, except that the amount here is less than the maximum limit under that statute. That decision is therefore directly applicable to the present case.

The question considered and decided in *Hanover Fire Ins. Co.* v. *Harding*, 272 U. S., 494, was whether or not an annual tax imposed upon foreign corporations, which was not imposed upon domestic corporations, was an unlawful discrimination which denied the equal protection of the laws to such foreign corporations. That question is not involved in the present case at all, as the minimum fee or tax required under the last clause of Section 105 and specified in Section 107 of the Act is imposed upon both foreign and domestic corporations exactly alike under the same conditions.

The Court also refers to the case of *International Paper Co.* vs. *Massachusetts*, 246 U. S., 135, as holding void a statute imposing a tax upon a foreign corporation applying for admission to Massachusetts. The opinion in that case discloses, however, that the tax there imposed was an annual franchise tax, which was applied to the entire authorized stock of a corporation previously admitted and doing business in the State, after the original statute with the maximum limit of $2,000 had been removed. That case therefore appears to be unlike the *General Railway Signal Company* case and the present case in every essential respect. The Court there also expressly distinguished several other cases of the same character, by reason of provisions qualifying or restricting the operation and effect of the statutes in those cases, which are applicable in the present case.

The last clause of Section 105, together with Section 107, does not in fact provide for an additional or enlarged tax, as the Court appears to have understood. These provisions merely require all corporations to pay a minimum tax in the amount specified in Section 107, with a maximum limit in the amount of such tax, for having the privilege of doing business in the State. The rate provided by Section 105 is not applied at all unless the amount of tax computed therein would exceed the minimum amount fixed by Section 107 for maintaining the

right to do business in the State. In that event, the rate under Section 105 becomes effective and the tax is computed upon the proportion of capital stock actually used in exercising the corporation franchise in the State.

The franchise tax specified in Section 107 is not based on the entire capital stock, or capital of a corporation, or computed on that basis. On the contrary, the tax is fixed within graduated limits, with a very reasonable maximum amount for corporations having issued capital stock in excess of $20,000,000. Appellee admittedly has a total capitalization of $36,249,750, with more than twice that amount of property or assets, a substantial part of which are located and used in local business in Illinois. The tax therefore was not imposed upon either the total capitalization or property of the corporation, as was done in the *International Paper Company* and *Crane Company* cases.

The Circuit Court in deciding this case appears to have applied general rules which were applicable to the cases mentioned, but failed to distinguish the different characteristics of the statute in this case. That Court has therefore overlooked the doctrine stated by this Court with respect to the exercise of the taxing power by a state, in the case of *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S., 688, 698: "The substance and not the shadow determines the validity of the exercise of the power". It

seems clear that a consideration of the substance of the statute as applied in this case will disclose that it was a valid exercise of the taxing power of the State.

IV.

The District Court in its decision construed the Statute correctly and properly dismissed the bill of Complainant for want of equity.

The memorandum of views of the District Court in this case clearly sets forth the nature and purpose of the tax imposed under Section 107 of the Act, and distinguishes it from a tax computed at the rate specified in Section 105. After stating the contentions of appellee and setting forth the provisions of the two sections of the statute, the learned Judge of that Court in his opinion said:

> "The two statutes here involved attempt to tax two entirely different things. Section 107 is clearly 'a franchise tax', while Section 105 provided a tax upon 'the exercise of the franchise' and does not become operative until the business done and property used in the exercise of the franchise, measured by the standards provided in Section 105, produce an amount equal to or greater than the amount of the mere franchise tax provided in Section 107. When that point is reached in the exercise of the franchise, then Section 107 ceases to be operative and Section 105 controls the amount." (R. 32).

That Court in its opinion also clearly distinguished the *International Paper Company* case and like cases there referred to and followed, including the *Crane Company* case, and showed that the present case comes directly within the principles applied in the *General Rail-*

way Signal Company case and is controlled by the decision in that case. After showing the privileges granted to appellee by the State, for which the tax was imposed, and replying to its contentions in regard to the tax, the Court referred to the comment urged by it on the status of the above case, and quoted the conclusion of Mr. Justice McReynolds in the opinion rendered by him in that case, as follows:

> "Considering what we said in (citing a number of decisions of the Court) the two characteristics of the statute just referred to must be regarded as sufficient to save its validity." (R. 37).

And the District Court added in its opinion herein:

> "The two characteristics referred to by Mr. Justice McReynolds are: (1) That the prescribed fees do not vary in direct proportion to capital stock and that a maximum is fixed; (2) In the class to which plaintiff in error belongs the amount specified is $1,000 and 'under all the circumstances, we cannot say this is wholly arbitrary or unreasonable.'
>
> "So, in this case, we conclude that the case made out by plaintiff's bill may also be along the border line, but the taxing statutes here involved, possessing the two characteristics referred to in the *General Railway Signal Co. case, supra*, must be regarded as sufficient to have their validity."

The statute here involved is more reasonable and closely related to the privilege granted than any similar statute heretofore considered by the Court in any case, in that it provides the issued capital stock instead of authorized stock as the measure of the tax on a restricted scale, and also fixes a very low maximum limit in the

tax for the privilege of using the amount of stock to which it applies. In the present case, the tax amounts to only $1 for each $36,249.75 of the issued capital stock, and in no case could the maximum tax amount to more than $1 for each $20,000 of such stock. The imposition of such a small franchise tax for the valuable privilege granted and actually exercised by appellee in this case is not only reasonable but could not burden interstate commerce or tax property outside the State.

The fact that appellee actually has some property and is transacting some business in the State does not affect the right of the State to impose the minimum tax against it, as provided by Section 105 and 107. Appellee is required to pay no more than other corporations with a like amount of capital stock, but which merely maintain their right to do business in the State and therefore cannot complain on that ground. The contention urged by appellee would clearly discriminate against such other corporations and in favor of those actually having a comparatively small amount property and business in the State. Such a construction would necessarily invalidate Section 107 and leave the State without any power to impose any franchise tax for granting the privilege to corporations to do business in the State from year to year.

The memorandum of the views of the District Court shows that the privilege granted to a foreign corpora-

tion is a valuable privilege, even though it may not be immediately exercised to any great extent in doing a local business in the State. As the Court stated, the value of the franchise necessarily bears a most legitimate relation to the amount of capital stock which may be used in the exercise of the franchise. The grant of such a privilege to the corporation gives it the right to use as much of its capital stock as it may see fit in the exercise of its franchise in the State. This clearly affords a valid basis for imposing a franchise tax on such a corporation, measured to some extent by the capital stock which may be used, with a reasonable limit in the maximum amount of tax which may be imposed for the privilege granted.

For the foregoing reasons, it is respectfully urged that the statute as applied in this case does not violate any provision of the Federal Constitution or the Fourteenth Amendment thereto, as alleged in the bill of complaint, and that therefore the judgment of the Circuit Court of Appeals in this case should be reversed and that the decree of the District Court should be affirmed.

Respectfully submitted,

OSCAR E. CARLSTROM,
Attorney General of Illinois,
Counsel for Appellant.

BAYARD LACEY CATRON,
Assistant Attorney General,
Of Counsel for Appellant.

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JAN 13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1929.

No. 60

WILLIAM J. STRATTON, Secretary of State of the State of Illinois, *Appellant*,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, a Corporation, *Appellee*.

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY BRIEF OF APPELLANT.

Oscar E. Carlstrom,
Attorney General of Illinois,
Counsel for Appellant.

Bayard Lacey Catron,
Assistant Attorney General,
Of Counsel for Appellant.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1929.

No. 98

WILLIAM J. STRATTON, SECRETARY OF STATE OF THE STATE OF ILLINOIS, *Appellant,*

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, A CORPORATION, *Appellee.*

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY BRIEF OF APPELLANT.

I and II.

The Statute and Question Involved in this Case.

Appellee admits that the statement made by appellant correctly states the facts. This statement showed that the assessment of appellee's annual franchise tax was properly made on the basis specified in Section 107, pursuant to the proviso or last clause of Section 105 of the Illinois Corporation Act.

Nevertheless, appellee refers to various other sections of the Act, which appear to have little or no application here and merely tend to confuse the issue. The final result, as stated by appellee on page 4, is that for both foreign and domestic corporations, "the Secretary of State computes their annual franchise taxes as is provided by paragraphs (sections) 105 and 107 of the statute and as set forth in appellant's brief."

Again, under Point I of its argument, appellee discusses certain other provisions of the Corporation Act, which are not applicable to the question involved in this case. In so doing, appellee ignores the proviso in Section 105, which specifically requires that at least the minimum fee provided by Section 107 shall be paid by each corporation which maintains the privilege of doing business in the State.

Section 101 of the Act deals only with the admission fee and additional fees on increases in stock. That section specifically states that such fees are "in addition to the annual franchise fees and taxes hereinafter provided." Therefore, the annual franchise fees were not included therein, as stated parenthetically by appellee.

The case of *Armstrong* vs. *Emmerson*, 300 Ill., 54, dealt with the tax generally imposed at the rate specified in the first part of Section 105, and has no reference to the minimum tax required by the last part of that section, as specified in Section 107. This provision was discussed and applied by the Illinois Supreme Court in the cases of *Colgate & Co.* and *Beatrice Creamery Co.*, which were included in the group of cases reported as *O'Gara Coal Co.* vs. *Emmerson*, 326 Ill., 18, at 43-4, referred to by appellee on page 5 of its statement.

There can be no question as to the true meaning and purpose of the statute. If there were any such question, this Court would of course follow the Illinois Supreme Court in construing the statute which contained the same provisions here involved, except for the change from authorized to issued stock as the basis for computing the tax. The application of the statute on the latter basis was approved by the Illinois Court in those cases, in conformity with the decision of this Court in the *Airway* case.

The provision for a minimum fee or tax is not of a secondary nature, but may more properly be termed a primary or fundamental requirement. This provision does not require that "you must pay more," as supposed by appellee. The preceding provisions of Section 105 in

fact require a corporation to pay more, if the five cent rate on the basis there provided will produce a larger amount of tax. The mere circumstance that it would produce a less amount in this case does not relieve appellee or any other corporation from the payment of at least the minimum fee fixed by Section 107.

The statement of the question involved in this case by appellant is restated in varied form by appellee on page 15 of its argument. The first restatement omits the essential features that the prescribed fees do not vary in direct proportion to the capital stock, and that a maximum limit in the amount of the tax is fixed, which is directly applicable to appellee here.

The second question stated, as to whether the State could discriminate between domestic and foreign corporations, is entirely beside the question here, as the statute applies alike to both domestic and foreign corporations. Furthermore, the statute applies alike to corporations having either a large or small amount of capital stock, within the limits fixed for the amount of stock they are given the privilege of using in the State.

The third question is likewise irrelevant, inasmuch as the statute does not require a foreign corporation to bring any fixed amount of its assets and business into the State, but merely requires any such corporation to pay

at least a limited minimum fee for maintaining the privilege of using its capital stock in the State, which it may exercise as it sees fit during the year.

III.

The Franchise Tax imposed is not a direct burden on the Interstate Commerce of Appellee.

The cases referred to by appellee on this point are not applicable. In the *Western Union Telegraph Co., Looney* v. *Crane Co.* and *International Paper Co. cases,* the statutes imposed a tax computed upon the entire authorized capital stock of foreign corporations, without any restriction or limitation in either the stock or the amount of the tax. Those statutes therefore contained none of the provisions which limited and restricted the effect of statutes approved by this Court in prior cases, and which likewise limit and restrict the operation of the statute in the present case.

Neither was the *Airway* case in any way similar to this case. The statute there was based on authorized capital stock and while it purported to be limited to the proportion used in the State, it was in fact applied to a much larger number of shares than the total amount of issued stock, which necessarily resulted in a direct tax upon the property and business outside of the taxing state. In the *Cudahy Packing Co.* case, the tax was also measured by a large amount of authorized capital stock,

of which only about two-thirds was issued and outstanding. These features clearly distinguish those cases from the present case.

Appellee assumes that the tax here imposed is a direct burden because the amount happens to be larger than it would be if computed on the basis provided in the first part of Section 105. That result is entirely immaterial to the question here considered. The statute imposes a minimum fee or tax in graded amounts for the privilege granted of doing business in the State during the year. There is a reasonable relation between the amount of tax and the value of the privilege granted. The fact that appellee has failed to exercise its privelege to a sufficient extent to produce an equal or greater tax on a different basis does not show any direct burden on its interstate commerce or any invalidity in the tax assessed.

Appellee contends that the case of *General Railway Signal Co.* v. *Virginia,* 246 U. S., 500, is not in point, but fails to show any material distinction. The admission tax there imposed is exactly the same in principle as the tax here for the privilege granted or renewed for the next year. The statutes are identically the same in their purpose and effect.

The Virginia statute fixed no scale of "maximum" taxes, but instead fixed the tax in certain graded amounts, with a limited maximum amount, exactly as the

statute does in the present case. The fact that another provision of the statute here provides for an increase in the tax upon a sufficient exercise of a franchise, does not in any way affect the validity of the minimum tax required to be paid.

Since the tax imposed under the Virginia statute was not a direct burden on interstate commerce, for the reasons there stated, the tax here imposed cannot be deemed a burden. Its effect is not altered by any other provision for computing the tax upon a different basis, which may be made applicable by a greater exercise of the franchise in the taxing state.

IV.

The Appellee is not deprived of any of its Property without Due Process of Law.

The general rule that a state may not levy a tax on property outside its limits is not in question, and the citation of authorities on that point is superfluous. Neither is any citation of authority to this Court required to show that issued capital stock may be properly used as the measure of an excise or franchise tax levied within the authority of a state, although such stock may represent in part property outside the state or interstate commerce.

The statute in the *Western Union Telegraph Co.* case was expressly applied to all the capital of the company everywhere, without any limitation in the amount

or restriction to the reasonable value of the privilege granted by the taxing state. The nature of that case, as well as the other cases cited on this point, have been discussed in connection with the preceding point. They are likewise inapplicable here, for the reasons already pointed out in this brief and by the Court in some of those cases, and no further discussion of them would seem to be required.

The assumption of appellee that its tax should be only $135.21, and that any tax above that amount is a tax on its property and business outside the State, is entirely unjustified. Appellee is seeking to apply to itself a provision of the statute which is expressly made inapplicable to it, in order to avoid a provision which is applicable to it and all other corporations. That provision is that each corporation is required to pay at least the minimum fee or tax which is fixed by Section 107 of the Act.

The provisions of the first part of Section 105, which appellee seeks to apply to itself, do not apply to it or any other corporation unless the amount of tax under those provisions would exceed the minimum fee or tax provided by Section 107. The payment of this minimum fee or tax for the privilege granted of doing business in the State is required of all corporations. The sole question is whether the payment of such a minimum fee or franchise

tax may be required for the privileges granted by the State. The fact that the tax might be less if computed on a different basis has no bearing on this question.

The argument of appellee on this point ignores the fact that the statute provides a minimum excise or franchise tax for the privilege granted of doing business in the State, and that if the franchise is sufficiently used or exercised in the State to produce a larger tax on the basis of such use, then the larger amount must be paid for the exercise of the privilege. The selected measure in each case is merely a matter of convenience in computing the tax for the privileges granted by the State and affords no basis for the assumption that it applies to property outside the State, and in fact it does not do so.

V.

The Statute and its application to Appellee does not deprive it of the Equal Protection of the Laws.

The principal contention of appellee appears to be that the statute discriminates against it, contrary to the equal protection clause of the Fourteenth Amendment. This contention did not receive any support from the Circuit Court and apparently has no foundation in fact.

Appellee refers to discrimination in several ways between corporations, both foreign and domestic, and cites various authorities, but none of them appear to be

in point here. There can be no such discrimination in this case, as the statute applies alike to both foreign and domestic corporations in the same circumstances.

Appellee complains that the statute discriminates against it because it is required to pay the minimum fee for the privilege granted of doing business in the State, while some other corporations which exercise their franchises to a much greater extent, may pay a fee or tax measured by the proportion of capital stock used in the State. This in fact results in a higher tax being paid by such other corporations and certainly would not seem to discriminate against appellee, which pays a less tax in proportion to the capital stock which it has the privilege of using in the State.

Appellee admits that a franchise tax fixed as provided by Section 107 may bear "a fair relation" to the value of the privilege granted to do business, but urges that the fee or tax measured on the basis provided by Section 105 bears "a more true relation" to the value of the franchise (or privilege of doing business). Appellee therefore concludes that a tax should be computed only on the latter basis, as having a more true relation to the value of the privilege and that no tax on any other basis should be imposed.

When appellee admits that the franchise tax imposed in this case may bear a fair relation to the value of the privilege granted of doing business in the State, it concedes that the tax is imposed on a valid basis. It is immaterial that appellee may believe that some other basis for computing a tax bears a more true relation to the value of the privilege granted or exercised. The State is not required to select a method which may be considered the most reasonable and fair basis for computing franchise taxes imposed upon corporations. It is only required to select a method which bears some relation to the value of the privilege granted. It is admitted by appellee that this has been done and if so, the statute is not arbitrary, but is reasonable and valid.

The contention that the statute is discriminatory because it fixes two "bases" for a franchise tax, merely confuses the minimum franchise tax for the privilege granted, with the larger tax which may be imposed upon the exercise of the privilege. These provisions are applicable under different conditions and apply equally in all cases without favor or discrimination in the case of any corporation to which the respective provisions are applicable.

Appellee complains here, as it did in the Court below, that these provisions as applied discriminate against

it and in favor of corporations with a less amount of issued stock. This contention was referred to and answered by the District Court in stating its views in this case. Appellee is apparently irritated by the obvious answer made and clearly misconstrues the views expressed by the Court. Its comment is not justified by the reply or the facts.

The difficulty with appellee here is that it considers this tax essentially as a property tax, or as a tax according to the value of property and business, and not as an excise or franchise tax. For that reason, it insists that the tax should be computed only on the part of its capital employed in the State, without any regard to the amount of capital which it is granted the privilege of using in the State. The value of the privilege granted has a direct relation to the amount of capital which may be used and which may be considered to a reasonable extent in fixing the amount of tax to be paid.

It is urged that most foreign corporations pay a franchise tax upon the basis of the part of their capital represented in the State, but appellee is required to pay on a different basis. In so doing, such corporations in fact pay a larger tax than appellee in proportion to their issued capital stock. This is due to the fact that they use a larger part of their stock in the State, but the payment of larger tax by them affords no ground for any claim of discrimination against appellee.

The State does not require corporations having a large amount of capital to bring more of their property and business into the State than small corporations, but only requires them to pay a reasonably limited amount for the privilege granted of using their capital in local business in the State. The amount of property and business in the State does not determine the amount of the tax in any case, but the issued stock only is considered in determining the value of the privilege granted or exercised in the State.

For example, a corporation having ten times as much capital as appellee, but having the same amount of property and business in Illinois and other states respectively, would be required under Section 105 to pay ten times the amount appellee contends it should pay for having the same amount of property and business in the State. On the other hand, a corporation having the same amount of capital as appellee, and the same amount of property and business in Illinois, but with only one-tenth of the total amount of property and business of appellee, would pay ten times as much tax as appellee contends it should pay under Section 105.

Appellee suggests that its minimum fee or charge for the privilege of doing a local business should not be over $10, the same as the minimum amount payable

by a corporation having capital stock of less than $50,000. In other words, although appellee admits that its issued stock has some relation to the value of the privilege granted to it by the State, it would pay the same fee for such privilege as a corporation having capital stock amounting to less than $50,000. There is certainly no consistency in such a claim.

It is also urged by appellee that as an interstate carrier, it is subject to the Transportation Act and could not abandon or increase its property in Illinois without securing a certificate therefor from the Commission. The regulation of the business of appellee by the Commission, in so far as it pertains to interstate commerce, has no bearing upon the power and authority of the State to grant the right or privilege of doing a local business in the State. The two respective authorities apply to different rights and activities and have no necessary relation to each other.

This case does not involve a question of classification in the sense referred to by appellee. There is no difference in treatment in the case of appellee from other corporations. All of them are required to pay at least the minimum fees fixed by the statute for maintaining the privilege of doing a local business in the State. The fact that some other corporations are re-

quired to pay proportionately larger fees on a different basis for exercising their franchise in the State to a much greater extent than appellee has done, does not affect it and therefore is no ground for complaint.

Appellee quotes from the case of *Royster Guano Co.* vs. *Virginia,* 253 U. S., 412, but that was merely a case of unintentional discrimination between domestic corporations and is in no way applicable here. Neither is the case of *Southern Railway Co.* vs. *Greene,* 216 U. S., 415, in which there was the discrimination of a higher tax against foreign corporations than domestic corporations were required to pay for substantially the same privileges.

The case of *Hanover Ins. Co.* vs. *Carr,* 272 U. S., 414, likewise involved a higher tax on foreign insurance corporations than domestic corporations were required to pay, which is not in question here. Neither is there any question here of requiring foreign corporations to submit to any unconstitutional provision as a condition of being permitted to do a local business, and therefore the quotation on that point from *Looney* vs. *Crane Co.,* 245 U. S., 184, is not applicable here.

The Court in the *Airway* case does not hold that the fee must be measured by the value of the privilege for which it is imposed, but merely states that some rela-

tion to such value is a reasonable requirement, as shown by the quotation from that case by appellee. This statement is construed by appellee to require a "fair relation" to the value of the privilege, which it here urges does not exist. This claim is nullified by appellee's prior admissions on pages 23 and 27, which indicate that such a fair relation does exist between the tax imposed and the privilege granted by the State.

The statute involved in the case of *International Shoe Co.* vs. *Shartel,* 279 U. S. 429, measured a tax for the exercise of the franchise by the proportion of the stock used in the State, in the same way as Section 105 of the Act here measures the tax for the exercise of the franchise in the State. The approval of a tax for such a privilege on that basis has no bearing on the basis of a minimum fee or tax for the privilege of maintaining the right to do business in the State. None of these cases indicates that there is any discrimination against appellee. The statute is applied equally to all corporations and consequently does not deny the equal protection of the laws to appellee or any other corporation.

VI.

The Cases cited and relied upon by Appellant sustain the Validity of the Statute and the Tax imposed.

A special effort is made by appellee to show that the case of *General Railway Signal Co.* vs. *Virginia,*

246 U. S., 500, is not applicable here. The claim that it was an admission tax, and therefore different from the tax here, is not sound. The tax imposed in that case was not only for the privilege of being admitted, but for actually doing a local business in the State. The tax here imposed is for maintaining the privilege of doing a local business and actually doing such business to a limited extent. There is no distinction in principle between the two cases and no reason is shown why the same rule should not apply.

The statement that the tax there was sustained "for lack of a more true and better basis for the tax," suggests a novel ground for sustaining the tax and the statute under which it was imposed. It indicates again appellee's view that the tax here and the statute under which it was imposed should be held invalid, merely for the reason that in such event the tax might be computed on another basis, which appellee conceives to be more fair and equitable. It need hardly be said that the constitutional questions cannot be disposed of upon any such basis of convenience or comparison.

The suggestion also that in this case the "scale of minimums" tends to raise the amount which appellee would otherwise be required to pay under the first provision of Section 105, as a reason for holding the tax

and statute invalid, is of the same character. The right of the State to impose a minimum fee or franchise tax for the privileges granted by it cannot be affected by any other provision of the statute which is intended to impose larger fees upon a greater exercise of the franchise in the State by a corporation.

The fact that the question of the equal protection of the laws did not arise in the cases referred to, as stated by appellee, merely indicates that there was no ground for raising any such question in those cases. The same is true in the present case. The statute is general in its application to all alike in the same circumstances. The situation is not made any different by reason of the fact that the statute provides for computing a fee on the basis of the exercise of the franchise in the State, when it will produce a larger amount than the minimum fees specified.

The maximum limit here in the amount of the tax provided on the minimum fee basis, is the same in principle as the maximum limit provided by the Massachusetts statute, which was applied in the *Baltic Mining Co.* and *Cheney Bros. Co.* cases. The statute here, however, as in the *Signal Co.* case, has further limitations in the tax imposed to certain graduated amounts of issued capital stock, which provide much greater limita-

tions than the mere maximum limit provided by the Massachusetts statute. In fact, that statute made no limitation or restriction in the tax up to $2000, and thus required all corporations having authorized capital stock of $10,000,000 or less to pay a tax measured by the entire authorized amount of their capital stock. The unlimited application of the statute in such cases is evidently the reason for its disapproval in subsequent decisions of this Court.

The provisions of a statute which limit and restrict its operation to a reasonable charge for the privilege granted by the State, thus making it compatible with the constitutional provisions, were referred to by the Court in *Looney* vs. *Crane Co.*, as quoted by appellee, and illustrated by the cases therein cited on this point. Those cases have been discussed in our original brief and were there shown to be applicable to the statute involved in the present case.

Appellee attempts to distinguish some of the cases referred to by us on the ground that they involved domestic corporations, but other cases relied upon to the same effect also involved foreign corporations. The constitutional provisions apply equally to both domestic and foreign corporations, and there is no material distinction in the principle of a minimum fee or franchise

tax in either case. Moreover, the statute here applies to both kinds of corporations alike, for maintaining the same privileges in the State and no distinction can be made on that ground.

The case of *Hump Hairpin Mfg. Co.* vs. *Emmerson,* 258, U. S., 290, which involved the application of a franchise tax to a foreign corporation in Illinois, has been repeatedly approved by this Court and never discredited in any way. The recent decision of the Illinois Court in the *O'Gara Coal Co.* cases, following the decision of this Court ni the *Airway* case and involving a different situation, is not in point or material here. *The Hump Hairpin* case and other cases cited by us showed clearly that the statute does not impose any burden on commerce or violate any constitutional right of appellee.

The case of *Cudahy Packing Co.* vs. *Hinkle,* 278 U. S., 460, imposed both an admission fee and annual franchise tax on the basis of authorized capital stock, without regard to the amount issued or which might be used by the corporation. The statute here is limited to issued stock only, and fixes a small tax within strictly graduated limits, with a very low maximum amount of tax for large corporations. The tax is closely related to the privileges granted and is very reasonable in amount. The statute and the tax imposed have been fully sustained by the decisions of this Court in similar cases.

VII.

The Circuit Court of Appeals apparently did not correctly interpret the Statute imposing the Tax.

Appellee has referred to the quotation by appellant from the opinion of the Circuit Court in this case, as indicating that it had misconceived the nature and effect of the tax. The quotation was taken from the opinion as it appears in the record in this case (R. 53). Even if a change was made in publishing the opinion, as suggested by appellee, that fact does not alter the opinion of record. Moreover, the alleged change indicates an erroneous understanding of the application of the statute, which apparently had a material bearing upon the conclusion of the Court.

The opinion of the Circuit Court would not of course invalidate a correct judgment. The opinion in this case apparently does show, however, that the judgment is based on erroneous grounds and therefore indicates that the judgment itself is erroneous. The grounds of the opinion are fully discussed in our original brief, at pages 21-26, and need not be repeated here.

For the reasons stated in appellant's original brief, and here referred to again, it is most respectfully but earnestly urged that the decision and judgment of the

Circuit Court of Appeals in this case is erroneous and should be reversed and that the decree of the District Court should be affirmed by this Court.

Respectfully submitted,

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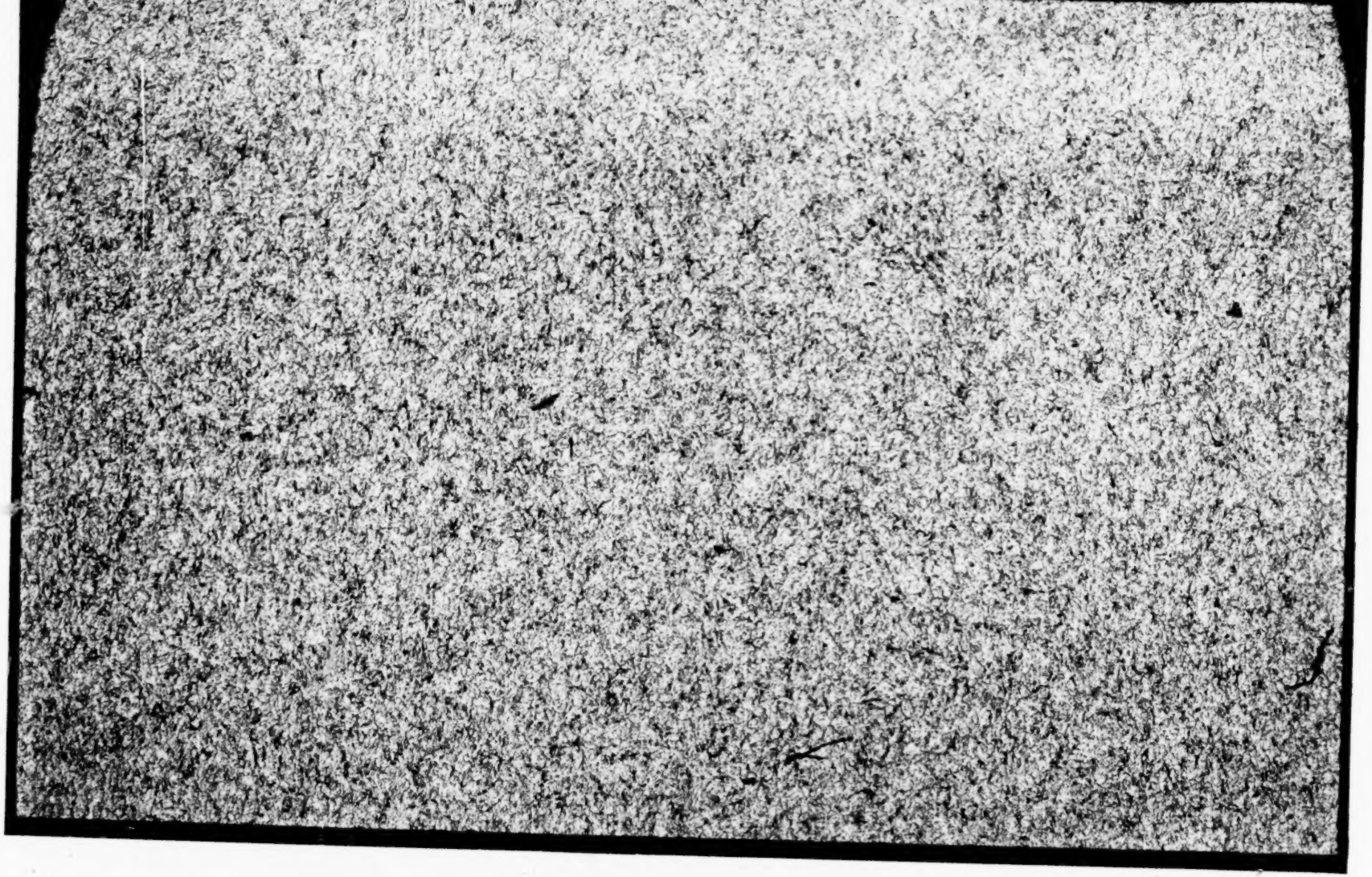

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1930

No. 6

WILLIAM J. STRATTON, SECRETARY OF STATE OF THE STATE OF ILLINOIS,

Appellant,

VS.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, A CORPORATION,

Appellee.

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

STATEMENT, BRIEF AND ARGUMENT FOR APPELLANT.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

This is an appeal from a decision of the United States Circuit Court of Appeals for the Seventh Circuit, reversing a decree of the District Court of the United

States for the Southern District of Illinois, and remanding the cause to that Court with directions to enter a decree consistent with the views expressed in the opinion of said Circuit Court. The opinion of that Court appears at pages 52-56 of the printed transcript of the record, and is contained in 30 Fed. (2nd) 322. The opinion of the District Court sustaining the motion of appellant to dismiss the bill of complaint for want of equity is set forth at pages 30-36 of the record, and is reported in 27 Fed. (2nd) 1005.

The appellee herein, St. Louis Southwestern Railway Company, is a corporation organized under the laws of the State of Missouri and has been authorized to do business in the State of Illinois. The annual report filed by it with the Secretary of State in February, 1927, showed that its authorized capital stock was $130,000,000, of which $36,249,750 was actually issued and outstanding. It was engaged in both intrastate and interstate transportation of freight and passengers as a common carrier. The total value of its road and equipment alone was $76,793,697.78, and its total business during the preceding year 1926 amounted to $18,201,955.32. The total length of its railroad tracks in all states was 940.58 miles. The value of its property in Illinois was reported as $786,196 and $15,000, or $801,196, and the business transacted by it in that State in 1926 amounted to $2,868.36 (R. 2-3, 11-13).

Section 102 of the Illinois Corporation Act requires both domestic and foreign corporations, including railroads, to make a report in writing to the Secretary of State in February of each year on forms furnished by him. The report relating to property and business is made for the preceding calendar year and is required to disclose such facts as to enable him to ascertain the proportion of capital stock represented by business transacted and tangible property located in that State, in order to assess the annual license fee or franchise tax in advance for the next year beginning July 1. Sections 105, 106 and 107 of said Act provide for the payment of the fee or tax to be assessed as follows:

> Section 105. Each corporation for profit including railroads, except insurance companies, heretofore or hereafter organized under the laws of this State or admitted to do business in this State, and required by this act to make an annual report, shall pay an annual license fee or franchise tax to the Secretary of State of five cents on each one hundred dollars of the proportion of its issued capital stock, or amount to be issued at once, represented by business transacted and property located in this state, **but in no event shall the amount of such license fee or franchise tax be less than that required by this act of corporations having no property or business in this state.**
>
> Section 106. In ascertaining the amount of the capital stock represented by business transacted and property located in this State, the sum of the business of any foreign or domestic corporation transacted in this State and the total property of such corporation located within this State shall be divided by the sum of the total property of the corporation wherever situated.

Section 107. In case it appears from the annual report that the corporation has no property located in this state, and is transacting no business in this state, the following fees shall be paid annually to the Secretary of State as an annual franchise tax: All such corporations having issued capital stock of $50,000 or less shall pay an annual fee of $10; corporations having issued capital stock of more than $50,000, but not exceeding $200,000, shall pay an annual fee of $15; corporations having issued capital stock of more than $200,000, but not exceeding $500,000, shall pay an annual fee of $20; corporations having issued capital stock of more than $500,000, but not exceeding $1,000,000, shall pay a fee of $50; corporations having issued capital stock of more than $1,000,000, but not exceeding $10,000,000, shall pay a fee of $200; corporations having issued capital stock of more than $10,000,000, but not exceeding $20,000,000, shall pay a fee of $500; **and all corporations having issued capital stock in excess of $20,000,000 shall pay an annual fee of $1,000.**

From the annual report filed by appellee, as above stated, it appeared that if its annual license fee were computed at the rate specified in Section 105 on the proportion of issued capital stock represented by property and business in Illinois during the preceding year, under the formula provided by Section 106, the tax would amount to only the sum of $135.21. However, as appellee had issued capital stock in the amount of $36,249,750, it appeared that it should pay an annual fee of $1,000 for the renewal of its privilege of doing business in Illinois for the next year, under the last clauses of Sections 105 and 107. Therefore, the Secretary of State assessed such required minimum fee against appellee as a franchise

tax for the next year, being the minimum fee of $1,000 provided by Section 107 for corporations having issued capital stock in excess of $20,000,000 (R. 3-5).

On July 21, 1927, appellee filed its bill of complaint in said District Court to enjoin the collection of the tax so assessed against it, on the alleged ground that such a tax would place an unreasonable burden upon interstate commerce and deprive appellee of its privileges and immunities as a citizen under paragraph 3 of Section 8, and Section 10 of Article 1, and Section 2 of Article IV, respectively, of the Constitution of the United States, and would also deny it the equal protection of the laws and deprive it of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States (R. 5-8).

The appellant filed a motion to dismiss the bill of complaint for want of equity and upon the hearing, the District Court allowed the motion and entered a decree dismissing the bill, pursuant to a written opinion which upheld the provisions of said Act as constitutional (R. 30-38). From this decree, appellee appealed to said Circuit Court, which held in substance that said Section 107 would impose an unlawful burden upon the interstate commerce of appellee and take its property without due process of law, and therefore reversed the decree of the District Court and directed it to enter a decree consistent

with the views stated. The petition of appellant for rehearing was denied and an appeal was then taken by him to this Court (R. 52-58).

All of the errors assigned are specified and relied upon by appellant for reversal. In substance they urge that said Circuit Court erred in reversing the decree of the District Court and directing it to enter a decree consistent with the views expressed by the Circuit Court, and in refusing to approve and affirm the decree of the District Court; that the Circuit Court erred in holding that said Section 107, as applied to foreign corporations such as appellee, imposes an invalid tax under the decisions of this Court, or an unlawful burden upon the capital and property of appellee outside the State of Illinois, or an illegal burden upon its interstate commerce, or discriminates against it or takes its property without due process of law, contrary to the commerce clause of the Constitution or the Fourteenth Amendment; and in refusing to hold that said Section 107, as applied to appellee, pursuant to the last clause of Section 105 of said Act, does not violate any provision of the Federal Constitution or the Fourteenth Amendment thereto (R. 58-60).

The Illinois Corporation Act requires all corporations organized or admitted to do business in that State and making an annual report, to pay annually at least the minimum fees specified in Section 107 of said Act, as

an excise or franchise tax for the right or privilege granted of doing business in that State during the next year. The tax is assessed in advance and it is assumed that the corporation will use a sufficient amount of its capital stock in the State to produce the minimum tax assessed at the rate specified in Section 105, or if not, that it should nevertheless pay such tax for the privileges granted to it by the State. In the event that the corporation shall use a larger proportion of its capital stock in the State, then the tax for the next year will be assessed upon such larger proportion at the rate fixed in Section 105, and the corporation will then be required to pay a larger tax on that basis.

The position of the appellant is that the State has the right to impose a reasonable minimum fee or tax in advance, for the privileges granted by it to a corporation to use its capital in carrying on a local business in the State during the next year, even though such privilege may not have been actually exercised to a substantial extent during the preceding year. The tax is imposed as a minimum fee for the privileges granted, which the corporation has a right to exercise if it shall desire to do so. Such a tax does not discriminate against any foreign or domestic corporation, but is applied uniformly to all corporations alike, under the same circumstances. It is a tax upon the privileges granted and does not affect property outside the State. Neither is it designed or intended to impose any burden on interstate commerce, nor does it have that effect.

SUMMARY OF ARGUMENT.

I.

The Illinois Corporation Act fixes a reasonable minimum fee for granting the privilege of doing business in that State.

The provision of Section 105 for the payment of an annual license fee or franchise tax at the specified rate on the proportion of capital stock represented by property and business in the State, is subject to the further provision that such fee or tax shall not be less than the minimum fee fixed by Section 107, with a maximum limit in the amount of the tax, for the privilege granted of doing business in the State.

General Corporation Act, Ill. Rev. Stats., Chap. 32, Secs. 105, 107.

O'Gara Coal Co. v. *Emmerson*, 326 Ill., 18, 43-4 (*Colgate & Co.* and *Beatrice Creamery Co.*)

II.

The principle of a graduated fee or franchise tax with a reasonable maximum limit has been repeatedly approved by this Court.

The provisions of the Act which require all corporations organized or admitted to do business in Illinois to

pay annually a minimum license fee or franchise tax, which is graduated to some extent upon the amount of issued capital stock and is limited to the specified maximum amount of tax, fix a reasonable excise or franchise tax for the privileges granted and do not violate any constitutional provision.

General Railway Signal Co. v. *Virginia*, 246 U. S., 500, 511;

Cheney Bros. Co. v. *Massachusetts*, 246 U. S., 147, 154-8;

Kansas City Ry. Co. v. *Kansas*, 240 U. S., 227, 232-5;

Baltic Mining Co. v. *Massachusetts*, 231 U. S., 68, 82-7;

Postal Tel. Cable Co. v. *Adams*, 155 U. S., 688, 698.

III.

The Statute does not impose an unlawful burden upon the Interstate Commerce of Appellee, or tax property outside the State.

The statute and the tax imposed in this case conform to the rule adopted by this Court that, while the State may not regulate interstate commerce or impose burdens upon it, it is authorized to levy a tax within its authority, measured by the capital stock in part used in the conduct of such commerce, where the circumstances

are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character.

Western Cartridge Co. v. *Emmerson*, 281 U. S., 511, 513;

Hump Hairpin Mfg. Co. v. *Emmerson*, 258 U. S., 290, 294;

Underwood Typewriter Co. v. *Chamberlain*, 254 U. S., 113, 120;

United States Glue Co. v. *Oak Creek*, 247 U. S., 321, 326;

Peck & Co. v. *Lowe*, 247 U. S., 165, 173-5;

Kansas City M. & B. R. R. Co. v. *Stiles*, 242 U. S., 111, 119;

Kansas City, etc., Ry Co. v. *Kansas*, 240 U. S., 227, 234.

New York v. *Latrobe*, 279 U. S., 421;

International Shoe Co. v. *Shartel*, 279 U. S., 429.

IV.

The United States Circuit Court of Appeals apparently misconceived the nature of the tax and its effect upon the business and property of appellee.

Opinion of Circuit Court, Record pp. 52-56;

Bill of Complaint, Record pp. 2-4, 11-13;

General Railway Signal Co. v. *Virginia*, 246 U. S., 500, 511;

Looney v. *Crane Co.*, 245 U. S., 178, 189-190;

International Paper Co. v. *Massachusetts*, 246 U. S., 135, 143-5;

Hanover Fire Ins. Co. v. *Harding*, 272 U. S., 494;

Postal Tel. Cable Co. v. *Adams*, 155 U. S., 688, 698.

The District Court in its decision construed the statute correctly and properly dismissed the bill of Complaint for want of equity.

Memorandum of Views of District Court, Record pp. 30-36;

General Railway Signal Co. v. *Virginia*, 246 U. S., 500, 511;

Cases distinguished:

International Paper Co. v. *Mass.*, 246 U. S., 135, 143-5;

Western Union Tel. Co. v. *Kansas*, 216 U. S., 1;

Looney v. *Crane Co.*, 246 U. S., 178, 189-190;

Cudahy Packing Co. v. *Hinkle*, 278 U. S., 460.

ARGUMENT.

I.

The Illinois Corporation Act fixes a reasonable minimum fee for granting the privilege of doing business in that State.

The bill of complaint in this case clearly shows that appellee was required, pursuant to the last clause of Section 105, to pay the minimum franchise tax specified in Section 107 of the Act for the privilege granted of doing a local business in the State during the next year, inasmuch as appellee had not used a sufficient proportion of its capital stock in this State the preceding year to make it subject to a larger tax under the rate specified in Section 105.

The real question in this case is, whether or not the State may require a corporation organized or admitted to do business in the State, to pay a minimum fee or franchise tax, as provided in Sections 105 and 107, for granting it the privilege of doing business in the State during the next year, although it may not have actually exercised its franchise in the State the preceding year to a sufficient extent to produce such an amount of tax at the rate specified in Section 105.

Sections 105 and 107 of the Corporation Act should be considered and construed together. The effect of both sections is to require every corporation, which desires to maintain the right or privilige of transacting local business in the State, to pay at least the fee specified in Section 107, based within limits on the amount of

issued capital stock which it may use in the State. However, if the rate specified in Section 105, applied to the proportion of the capital stock actually represented by its property and business in the State will produce a larger tax, then such larger tax must be paid, instead of the minimum fee. In such case, the fee is increased in direct proportion to the exercise of the privilege by the corporation.

The amount of issued capital stock of appellee in this case is $36,249,750. As this amount is in excess of $20,000,000, the minimum fee to be paid is $1000, which is the maximum amount provided by Section 107. A tax at the rate of five cents on each one hundred dollars, as specified in Section 105, would require the use of only $2,000,000 in the State to produce a tax amounting to $1000. The amount so required to be used is only about 5.5% of appellee's issued capital stock and only 2.2% of the total value of its property or assets.

It would seem to be reasonable for the State to require a corporation having a license to carry on business in the State to use at least this small proportion of its capital or assets in the state, or in any event to pay a tax on such proportion at the rate specified, for maintaining its rights in the state and exercising them as it desired. The state grants such privileges each year in advance and the corporation may exercise them by using as much of its capital in the State as may be convenient for it during the year.

The report of appellee showed that the property used by it in Illinois the preceding year was valued at $801.196, and that its local business in that State during such year amounted to 2,868.36. The total value of all its property was more than twice the amount of its capital stock, and its total business during the preceding year amounted to $18,201,955. It therefore appeared that appellee had been exercising its franchise to some extent in Illinois during the preceding year. In renewing or continuing its franchise, the State gave it the right to maintain its privileges and use such part of its capital in carrying on business in the State during the next year as it might desire, without the payment of any additional tax.

II.

The Principle of a graduated fee or franchise tax with a reasonable maximum limit has been repeatedly approved by this Court.

The principal of a franchise tax imposed upon a basis similar to that provided by Section 107 of this Act has been upheld by this Court in several cases. In *General Railway Signal Co.* v. *Virginia*, 246 U. S., 500, the statute of Virginia imposed a franchise tax for authority to do business in the State, which was graduated to some extent upon the amount of authorized capital stock, the fee being $1,000 for all corporations having an author-

ized capital stock of $1,000,000 to $10,000,000. The corporation in that case had an authorized capital stock of $5,000,000 and was therefore required to pay a tax of $1,000 for the privilege of being allowed to perform a single contract in the State which amounted to $85,597. The Court held that such a tax was not arbitrary or unreasonable and did not impose any burden upon interstate commerce.

In the case of *Kansas City, Ft. Scott & Memphis R. R. Co.* v. *Kansas*, 240 U. S., 227, the statute imposed a graduated franchise tax upon corporations, with a maximum limit of $2,500 on capital stock amounting to over $5,000,000. The Court again held that such a tax was reasonable and did not impose a burden upon interstate commerce, or violate the due process or equal protection provisions of the Fourteenth Amendment, although a large part of the property and business of that corporation was outside the State.

In the case of *Baltic Mining Co.* v. *Massachusetts*, 231 U. S., 68, the statute imposed a tax of 1/50 of 1% of the authorized capital stock of foreign corporations for the privilege of doing a local business in that State, with a maximum limit of $2,000 on a capital stock of $10,000,000 or more. The Court held that in view of the limitation and conditions, such a tax was reasonable and

did not necessarily burden interstate commerce or deny the equal protection of the laws to foreign corporations engaged in interstate commerce.

The Court again approved the Massachusetts statute in *Cheney Bros. Co.* v. *Massachusetts*, 246 U. S., 147, in the case of a foreign corporation doing business in that State, and also engaged in interstate commerce. However, after the maximum limit of the tax was removed by that State, and the tax was computed on the entire authorized capital stock, the Court held the statute invalid in the case of *International Paper Co.* v. *Massachusetts*, 246 U. S., 135, on the ground that it thus imposed an unreasonable burden upon interstate commerce and taxed property outside of the State.

The latter case followed the decision in *Looney* v. *Crane Co.*, 245 U. S., 178, in which the corporation had been admitted into the State in 1905, upon payment of a fee which was limited to $200 for a permit to do business for ten years, and thereafter paid an annual franchise tax until the permit was about to expire in 1915. During that time the maximum limit on the permit tax had been removed, thus extending the tax to the entire authorized capital stock. The annual franchise tax was also computed on that basis, or on the issued stock, surplus and undivided profits, in case they exceeded the amount of authorized stock. The Court held the statute invalid as

to both the permit tax and the annual franchise tax, on the ground that it then imposed a tax upon the entire authorized stock or capital of the corporation, without any limitation on the amount of the tax.

The Court in that case and also in the *International Paper Company* case expressly distinguished the other cases cited (*Baltic Mining Co.* v. *Massachusetts*, 231 U. S., 68; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S., 350; *Kansas City, Fort Scott & Memphis Ry. Co.* v. *Kansas*, 240 U. S., 227; *Kansas City, Memphis & Birmingham R. R. Co.* v. *Stiles*, 242 U. S., 111). In those cases, the Court approved statutes which contained provisions qualifying or restricting their operation and effect, such as the subject matter on which the tax was levied, or limitations on the amount of the tax, which restricted it to a reasonable maximum amount for the privilege granted, as in the present case. Those cases are directly applicable here and sustain the tax imposed in this case.

The present case is unlike *Cudahy Packing Co.* v. *Hinkle*, 278 U. S., 460, in which the tax was computed upon the entire *authorized* capital stock, although only two-thirds of such stock had been issued and the total value of the property did not exceed the amount of issued stock. The State there imposed both an additional permit or admission tax and the annual franchise tax

upon the basis of the entire authorized capital stock, and the maximum limit with respect to both kinds of tax was three times the maximum limit of the privilege tax in the present case.

The statute in the *Cudahy* case also differed radically from the statute here involved, in that the tax there was computed solely on a graduated amount of authorized capital stock, without any minimum or increase in proportion to the amount used in that state. The statute thus failed to make any distinction between corporations using little or no capital stock in the state, and those which used a large part or all of their capital in that state. It therefore appeared that no consideration was given to the difference between the value of the mere right to use the privilege granted, and the value of such privilege when largely or fully exercised by the corporation.

In the present case, the statute provides primarily for the payment of an annual license fee or franchise tax for the next year, to be computed at the specified rate upon the proportion of issued capital stock used in the state in the preceding year. However, if the corporation has used a very small part or none of its capital in the state the preceding year, it is apparent that an adequate tax cannot be assessed on that basis for granting or con-

tinuing its privileges for the next year. The statute therefore provides that in such cases a comparatively small minimum fee or tax shall be imposed for the privileges granted for the next year, which is graded to some extent upon the amount of issued stock which may be used in the state, with a low maximum limit on the amount of tax which may be imposed.

These essential and substantial differences in the basis and extent of the tax as imposed in this case clearly distinguishes it from the *Cudahy case* and afford proper grounds for a different conclusion in this case. The tax here imposed is strictly a franchise tax for the privilege granted of doing a local business as a corporation in the state. The amount provided is very reasonable in proportion to the issued capital stock in the several gradations which may be used, and likewise is limited to a comparatively small maximum amount. If such a reasonable excise or franchise tax may not be imposed for the privilege granted, then a foreign corporation may be admitted to do business in this state upon the payment of a trifling amount in the first instance, and may thereafter maintain the right or privilege of doing business in the state from year to year perpetually without any further payment, regardless of the value of the privileges granted by the state and maintained by the corporation.

In this case, appellee admittedly carried on a local business in Illinois and had a substantial amount of its property within the state. Furthermore, it had the privilege of increasing the amount of its property and business in that state during the next year without paying any additional tax, until the application of the rate specified in Section 105 would produce an amount in excess of the minimum tax provided by Section 107 of the Act. The fee charged was an excise or franchise tax for the privilege granted, and was not a tax on property outside the state. There appears to be a reasonable relation between the charge and the privilege granted, which applied to all corporations alike under the same circumstances, and did not discriminate against the appellee in this case.

III.

The Statute does not impose an unlawful burden upon the Interstate Commerce of Appellee or tax property outside the State.

This Court has frequently held that a franchise tax on corporations cannot be held to be repugnant to the commerce clause of the Constitution, merely because it is measured by the capital stock of such corporations. The rule applicable in such cases was clearly stated by the Court in the case of *Hump Hairpin Mfg. Co.* v. *Emmerson*, 258 U. S., 290. The Court there upheld a franchise

tax which was assessed under the Illinois statute against a foreign corporation, and which was computed upon the entire authorized capital stock, although more than nine-tenths of the business transacted consisted of sales made in interstate commerce. In considering the validity of the statute and the tax assessed, the Court said, at page 294:

> "While a state may not use its taxing power to regulate or burden interstate commerce (citing cases), on the other hand it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating Federal constitutional rights. * * *
>
> The turning point of these decisions is whether, in its incidence, the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon it, or whether it affects it only incidentally or remotely, so that the tax is not in reality a burden, although in form it may touch, and in fact distantly affect it."

This case was followed in the recent decision of this Court in *Western Cartridge Company* v. *Emmerson,* 281 U. S., 511, in which it appeared that more than five-sixths of the goods produced in that State were sold and shipped in interstate commerce, which were included in determining the amount of business transacted in that State. In considering the question of the right to include this business, together with the property or capital used in pro-

ducing such goods, for the purpose of fixing a franchise tax, this Court held that the State unquestionably had the power to tax all such property therein and to impose a license fee upon the local business. It was further held that a tax so imposed would not even indirectly burden interstate commerce, or indicate any intention on the part of the State to do so, but that if there was any burden at all, it was indirect and remote and did not violate the commerce clause.

This question was also fully considered in the case of *Kansas City Ry. Co. v. Kansas*, 240 U. S., 227, in which an annual graduated tax with a maximum limit was computed upon the issued capital stock of a railway corporation engaged in interstate commerce. After holding that the State would not be barred from imposing a tax upon the privilege granted, merely because the corporation is engaged in interstate as well as intrastate commerce, the Court said, at page 232-3:

> "And agreeably to the principle above mentioned, it has never been and cannot be maintained that an annual tax upon this privilege is in itself and in all cases, repugnant to the Federal power merely because it is measured by the authorized or paid up capital stock. The selected measure may appear to be simply a matter of convenience in computation and may furnish no basis whatever for the conclusion that the effort is made to reach subjects withdrawn from the taxing authority."

Likewise, in the case of *Kansas City M. & B. R. R. Co.* v. *Stiles*, 242 U. S., 111, in which a franchise tax was measured by the entire capital stock of a consolidated railroad company, it was urged that the statute was void because it taxed property *outside* the State and imposed a direct burden upon interstate commerce. After referring to the discussion of those questions in the above case and stating that it was there held that the State might measure a tax within its authority by capital stock which in part represented property beyond the taxing power of the State, the Court further said, at page 119:

> "So of the objection that the tax imposes a burden upon interstate commerce, the test of validity recognized in previous cases and repeated in *Kansas City, etc., Railway Co.* v. *Kansas, supra*, is the nature and character of the tax imposed. The State may not regulate interstate commerce or impose burdens upon it; but it is authorized to levy a tax within its authority, measured by capital in part used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character. In the present case, the franchise tax is imposed upon the capital stock of a corporation consolidated under the state law, and engaged in both interstate and intrastate commerce. We find nothing in the amount or character of the tax which makes it a burden upon interstate commerce and so beyond the authority of the state to impose."

The same principle applies in the case of a franchise tax measured by the net profits of a corporation. In

Underwood Typewriter Co. v. *Chamberlain*, 254 U. S., 113, an annual franchise tax was imposed by the State of Connecticut upon a foreign corporation, under a formula which allocated 47 per cent of its profits to that State, although only a little over three per cent of such profits were made from sales in the state. It was therefore contended that the tax burdened its interstate commerce and business in other states. The Court held, however, that a tax measured by such profits was entirely valid, although derived in part or mainly from interstate commerce. The Court applied the same principle with respect to franchise taxes measured by net profits in the cases of *United States Glue Co.* v. *Oak Creek*, 247 U. S., 321, and *Peck & Co.* v. *Lowe*, 247 U. S., 165.

This Court has specifically upheld statutes very similar to that involved in the present case, even though in some cases, as in *General Railway Signal Co.* v. *Virginia*, 246 U. S., 500, and other cases, the tax was measured by the authorized instead of issued capital stock, with a maximum limit in the amount of the tax. The difference in the principle of a statute which measures a tax by authorized instead of issued stock, when applied to a corporation having a substantial amount of unissued

stock, however, may well account for the contrary decision in the case of *Cudahy Packing Co.* v. *Hinkle, supra.* The difference also in the basis and general application of the tax is that case from the very limited application and amount of the tax in the present case, would seem to be entirely sufficient to sustain the validity of the statute and the tax imposed in this case.

The application of the statute to appellee in the present case certainly cannot be considered as made for the purpose or as having the effect of defeating Federal constitutional rights. Neither can the tax imposed affect interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of or restraint or burden on such commerce. The statute is clearly designed and intended to impose only a reasonable minimum charge upon all corporations, both foreign and domestic, for maintaining the privilege granted of doing a local business in the State during the next ensuing year, and of exercising such privilege to a limited extent if desired, without any additional charge for so doing. It seems clear that the statute, as so intended and as applied in this case, cannot be deemed to violate the commerce clause of the Federal Constitution, or any provision of the Fourteenth Amendment thereto.

IV.

The United States Circuit Court of Appeals apparently misconceived the nature of the Tax and its effect upon the Business and Property of Appellee.

The opinion of the Circuit Court of Appeals in this case indicates that the Court believed the tax should be in the nature of a property tax, rather than an excise or franchise tax. This is illustrated by the remark of the Court, after stating that appellant (appellee here) offered to pay the amount obtained by applying the first part of Section 105: "In short, appellant had $270,423 of its total assets located in Illinois. It offered to pay five cents on each one hundred dollars of property located in the State" (R. 53). This statement in the opinion is changed as reported in 30 Fed. (2nd) 322.

The amount mentioned by the Court was in reality the alleged amount or proportion of the issued capital stock of appellee represented by both property and local business in this State. As a matter of fact, the actual amount of the total property or assets which appellee had in Illinois amounted to $801,196. This amount, together with the local business transacted in the State the preceding year, which was given as $2,868.36, made a total amount of $804,064.36 for all of the property and business in the State, as stated in the bill and shown by the copy of report attached to the bill (R. 3, 12).

If the privilege tax had been computed at the statutory rate specified in Section 105 on the property admitted to be used in the State, it would have been about three times the amount admitted to be due, without considering the amount of local business transacted in the State. The tax here imposed, however, is an excise or franchise tax for the privilege granted of doing a local business in the State, and the tax is not based upon the amount of property or assets in the State, under either Section 105 or 107 of the Act.

The Court also appears to have approved the distinction which appellee sought to make in the case of *General Railway Signal Co. v. Virginia*, 246 U. S., 500. The tax imposed in that case was apparently a tax upon the right to enter and do business in the State. The tax here imposed is an excise or franchise tax for the renewal or continuation of the privilege granted to do business in the State during the next year. There is no essential difference in the character of the tax imposed in the two cases, and no such distinction was made by this Court in the case of *Looney v. Crane Co.*, 245 U. S., 178, which involved the renewal of a permit tax, as well as an annual franchise tax.

The second point of alleged distinction, that the *General Railway Signal Co.* case contained a maximum tax provision, whereas the last clause in Section 105 of the

Illinois Act contains a minimum provision, ignores the maximum tax provision or limit of $1,000 in Section 107, which was applied in this case. This is exactly the same in substance and effect as the Virginia statute, except that the amount here is less than the maximum limit under that statute. That decision is therefore directly applicable to the present case.

The question considered and decided in *Hanover Fire Ins. Co.* v. *Harding*, 272 U. S., 494, was whether or not an annual tax imposed upon foreign corporations, which was not imposed upon domestic corporations, was an unlawful discrimination which denied the equal protection of the laws to such foreign corporations. That question is not involved in the present case at all, as the minimum fee or tax required under the last clause of Section 105 and specified in Section 107 of the Act is imposed upon both foreign and domestic corporations exactly alike under the same conditions.

The Court also referred to the case of *International Paper Co.* v. *Massachusetts*, 246 U. S., 135, as holding void a statute imposing a tax upon a foreign corporation applying for admission to Massachusetts. The opinion in that case discloses, however, that the tax there imposed was an annual franchise tax, which was applied to the

entire authorized stock of a corporation previously admitted and doing business in the State, after the original statute with the maximum limit of $2,000 had been removed. That case therefore appears to be unlike the *General Railway Signal Company* case and the present case in every essential respect. The Court there also expressly distinguished several other cases of the same character, by reason of provisions qualifying or restricting the operation and effect of the statutes in those cases, which are likewise applicable in the present case.

The last clause of Section 105, together with Section 107, does not in fact provide for an additional or enlarged tax, as the Court appears to have understood. These provisions merely require all corporations to pay a minimum tax in the amount specified in Section 107, with a maximum limit in the amount of such tax, for having the privilege of doing business in the state. The rate provided by Section 105 is not applied at all unless the amount of tax thus computed would exceed the minimum amount fixed by Section 107 for maintaining the right to do business in the state. In such event, the rate under Section 105 becomes effective and the tax is computed upon the proportion of capital stock actually used in exercising the corporation franchise in the state.

The franchise tax specified in Section 107 is not based on the entire capital stock, or capital of a corporation, or computed on that basis. On the contrary, the tax is fixed within graduated limits, with a very reasonable maximum amount for corporations having issued capital stock in excess of $20,000,000. Appellee admittedly has a total capitalization of $36,249,750, with more than twice that amount of property or assets, a substantial part of which are located and used in local business in Illinois. The tax therefore was not imposed upon either the total capitalization or property of the corporation, as was done in the *International Paper Company* and *Crane Company* cases.

The Circuit Court in deciding this case appears to have applied general rules which were applicable to the cases mentioned, but failed to distinguish the different characteristics of the statute in this case. That Court has therefore overlooked the doctrine stated by this Court with respect to the exercise of the taxing power by a state, in the case of *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S., 688, 698: "The substance and not the shadow determines the validity of the exercise of the power". It seems clear that a consideration of the substance of the statute as applied in this case will disclose that it was a valid exercise of the taxing power of the State.

V.

The District Court in its decision construed the Statute correctly and properly dismissed the bill of complaint for want of equity.

The memorandum of views of the District Court in this case clearly sets forth the nature and purpose of the tax imposed under Section 107 of the Act, and distinguishes it from a tax computed at the rate specified in Section 105. After stating the contentions of appellee and setting forth the provisions of the two sections of the statute, the learned Judge of that Court in his opinion said:

> "The two statutes here involved attempt to tax two entirely different things. Section 107 is clearly 'a franchise tax', while Section 105 provided a tax upon 'the exercise of the franchise' and does not become operative until the business done and property used in the exercise of the franchise, measured by the standards provided in Section 105, produce an amount equal to or greater than the amount of the mere franchise tax provided in Section 107. When that point is reached in the exercise of the franchise, then Section 107 ceases to be operative and Section 105 control the amount." (R. 32).

That Court in its opinion also clearly distinguished the *International Paper Company case* and like cases there referred to and followed, including the *Crane Company* case, and showed that the present case comes directly within the principles applied in the *General Railway Signal Company* case. After referring to the priv-

ileges granted to appellee by the State, for which the tax was imposed, and replying to its contentions in regard to the tax, the Court also referred to the comment urged by it on the status of the *Signal Company* case, and quoted the conclusion of Mr. Justice McReynolds in the opinion rendered by him in that case, as follows:

> "Considering what we said in (citing a number of decisions of the Court) the two characteristics of the statute just referred to must be regarded as sufficient to save its validity." (R. 37).

And the District Court added in its opinion herein:

> "The two characteristics referred to by Mr. Justice McReynolds are: (1) That the prescribed fees do not vary in direct proportion to capital stock and that a maximum is fixed: (2) In the class to which plaintiff in error belongs the amount specified is $1,000 and 'under all the circumstances, we cannot say this is wholly arbitrary or unreasonable.'
>
> "So, in this case, we conclude that the case made out by plaintiff's bill may also be along the border line, but the taxing statutes here involved, possessing the two characteristics referred to in the *General Railway Signal Co. case, supra*, must be regarded as sufficient to save their validity."

The statute here involved is more reasonable and closely related to the privilege granted than any similar statute heretofore considered by the Court in any case, in that it provides the issued capital stock instead of authorized stock as the measure of the tax on a restricted scale, and also fixes a very low maximum limit in the tax for the privilege of using the amount of stock to

which it applies. In the present case, the tax amounts to only $1 for each $36,249.75 of the issued capital stock, and in no case could the maximum tax amount to more than $1 for each $20,000 of such stock. The imposition of such a small franchise tax for the valuable privilege granted and actually exercised by appellee in this case is not only reasonable but could not burden interstate commerce or tax property outside the State.

The fact that appellee actually has some property and is transacting some business in the State does not affect the right of the State to impose the minimum tax against it, as provided by Section 105 and 107. Appellee is required to pay no more than other corporations with a like amount of capital stock, but which merely maintain their right to do business in the State, and therefore it cannot complain on that ground. The contention urged by appellee would clearly discriminate against such other corporations and in favor of those actually having a comparatively small amount of property and business in the State. Such a construction would necessarily invalidate Section 107 and leave the State without any power to impose any franchise tax for granting the privilege to corporations to do business in the State from year to year.

The memorandum of the views of the District Court shows that the privilege granted to a foreign corpora-

tion is a valuable privilege, even though it may not be immediately exercised to any great extent in doing a local business in the State. As the Court stated, the value of the franchise necessarily bears a most legitimate relation to the amount of capital stock which may be used in the exercise of the franchise. The grant of such a privilege to the corporation gives it the right to use as much of its capital stock as it may see fit in the exercise of its franchise in the State. This clearly affords a valid basis for imposing a franchise tax on such a corporation, measured to some extent by the capital stock which may be used, with a reasonable limit in the maximum amount of tax which may be imposed for the privilege granted.

For the foregoing reasons, it is respectfully urged that the statute as applied in this case does not violate any provision of the Federal Constitution or the Fourteenth Amendment thereto, as alleged in the bill of complaint, and that therefore the judgment of the Circuit Court of Appeals in this case should be reversed and that the decree of the District Court should be affirmed.

Respectfully submitted,

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Attorney General of Illinois,
Counsel for Appellant.

BAYARD LACEY CATRON,
Assistant Attorney General,
Of Counsel for Appellant.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1930.

No. 6.

WILLIAM J. STRATTON, SECRETARY OF STATE OF THE STATE OF ILLINOIS, *Appellant,*

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, A CORPORATION, *Appellee.*

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY BRIEF OF APPELLANT.

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IN THE

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WILLIAM J. STRATTON, SECRETARY OF STATE OF THE STATE OF ILLINOIS, *Appellant,*

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, A CORPORATION, *Appellee.*

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY BRIEF OF APPELLANT.

The Statute and Nature of the Tax.

Appellee admits that the statement made by appellant correctly states the facts. This statement showed that the assessment of appellee's annual franchise tax was properly made on the basis specified in Section 107, pursuant to the proviso or last clause of Section 105 of the Illinois Corporation Act.

Nevertheless, appellee refers to various other sections of the Act, which appear to have little or no application here and merely tend to confuse the issue. The final result, as stated by appellee on page 4, is that for both foreign and domestic corporations, "the Secretary of State computes their annual franchise taxes as is provided by paragraphs (sections) 105 and 107 of the statute and as set forth in appellant's brief."

Again, under Point I of its argument, appellee refers to Sections 80, 81 and 101 of the Corporation Act, which are not applicable to the question involved in this case. Section 80 merely requires that a certificate of authority be obtained upon payment of like fees as required of domestic corporations. Section 81 specifies the facts required to be set forth in the application for the certificate (Appellee's Appendix, pp. 45-47).

Section 101 of the Act deals only with the admission fees and additional fees on increases in stock. That section specifically states that such fees are "in addition to the annual franchise fees and taxes hereinafter provided." Therefore, the annual franchise fees are not included therein, but are provided for by Sections 105 and 107 of the Act.

There is nothing in the Record herein showing what admission fee has been paid by appellee and that matter is not involved in this case. The only matter involved is

the annual franchise tax for the year in question. Appellee must have paid at least the amount of the minimum fee when admitted, and a similar amount for each year thereafter, inasmuch as the statute has contained that requirement since it was first enacted in 1919. The objection to that provision is now raised in this case for the first time.

The case of *Hanover* v. *Carr*, 272 U. S., 494, is not at all in point. That was a case of discrimination against foreign fire insurance companies, as compared with domestic companies in Illinois. The statute here involved is applied to both foreign and domestic corporations on exactly the same basis. Consequently, there cannot be any discrimination whatever between the two classes of corporations.

II.

The Question Involved in this Case.

The statement of the question involved in this case by appellant is restated in varied form by counsel for appellee on page 14 of their argument. The first restatement omits the essential conditions that the prescribed fees do not vary in direct proportion to the capital stock, and that a maximum limit in the amount of the tax is fixed, which is directly applicable to appellee here.

The second question stated ignores the essential difference in the provision for the payment of a minimum

fee for the privileges granted, and the fee imposed upon the substantial exercise of the privilege. The question also ignores the fact that the statute applies alike to corporations having either a large or small amount of capital stock, within the limits fixed for the amount of stock they are given the privilege of using in the State.

The third question like the first ignores the two essential conditions of the statute which saves its validity, as held by this Court in similar cases. The statute merely requires every corporation to pay at least a limited minimum fee for maintaining the privilege of using its capital stock in the State, which it may exercise as it sees fit during the year.

III.

The Franchise Tax imposed is not a direct burden on the Interstate Commerce of Appellee.

The cases referred to by appellee on this point are not applicable. In the *Western Union Telegraph Co., Looney* v. *Crane Co.* and *International Paper Co. cases,* the statutes imposed a tax computed upon the entire authorized capital stock of foreign corporations, without any restriction or limitation on either the amount of stock or the amount of the tax. Those statutes therefore contained none of the provisions which limited and restricted the effect of statutes approved by this Court in prior cases, and which likewise limit and restrict the operation of the statute in the present case.

Neither was the *Airway* case in any way similar to this case. The statute there was based on authorized capital stock and while it purported to be limited to the proportion used in the State, it was in fact applied to a much larger number of shares than the total amount of issued stock, which necessarily resulted in a direct tax upon the property and business outside of the taxing state. In the *Cudahy Packing Co. case,* the tax was also measured by a large amount of authorized capital stock, of which only about two-thirds was issued and outstanding. Moreover, the statute in that case was applied on that basis in all cases, without regard to the amount or proportion of capital used in the State, unlike the statute in the instant case. These features clearly distinguish those cases from the present case.

Appellee assumes that the tax here imposed is a direct burden because the amount happens to be larger than it would be if computed on the basis provided in the first part of Section 105. That result is entirely immaterial to the question here considered. The statute imposes a minimum fee or tax in graded amounts for the privilege granted of doing business in the State during the year. There is a reasonable relation between the amount of tax and the value of the privilege granted. The fact that appellee has failed to exercise its privilege to a sufficient extent to produce an equal or greater tax on

a different basis does not show any direct burden on its interstate commerce or any invalidity in the tax assessed.

Appellee ignores the case of *General Railway Signal Co.* v. *Virginia,* 246 U. S., 500, on this point, and fails to show any distinction from that case. The admission tax there imposed is exactly the same in principle as the tax here for the privilege granted or renewed for the next year. The Virginia statute fixed the tax in certain graded amounts, with a limited maximum amount, precisely as the statute does in the present case.

Since the tax imposed under the Virginia statute was not a direct burden on interstate commerce, for the reasons there stated, the tax here imposed cannot be deemed a burden. Its limited application and the provision for computing the tax upon a different basis, in case of a greater exercise of the franchise in the taxing state, would seem to obviate any such effect in any case.

IV.

The Appellee is not deprived of any of its Property without Due Process of Law.

The general rule that a state may not levy a tax on property outside its limits is not in question, and the citation of authorities on that point is superfluous. Neither is any citation of authority required to show that issued capital stock may be properly used as the measure of an

excise or franchise tax levied within the authority of a state, although such stock may represent in part property outside the state or interstate commerce.

The statute in the *Western Union Telegraph Co.* case was expressly applied to all the capital of the company everywhere, without any limitation in the amount or restriction to the reasonable value of the privilege granted by the taxing state. The nature of that case, as well as the other cases cited on this point, have been discussed in connection with the preceding point. They are likewise inapplicable here, for the reasons already pointed out in this brief and by the Court in some of those cases, and no further discussion of them would seem to be required.

The assumption of appellee that its tax should be only $135.21, and that any tax above that amount is a tax on its property and business outside the State, is entirely unjustified. Appellee is seeking to apply to itself a provision of the statute which is expressly made inapplicable to it, in order to avoid a provision which is applicable to it and all other corporations. That provision is that each corporaton is required to pay at least the minimum fee or tax which is fixed by Section 107 of the Act.

The provisions of the first part of Section 105, which appellee seeks to apply to itself, do not apply to it or any

other corporation unless the amount of tax under those provisions would exceed the minimum fee or tax provided by Section 107. The payment of this minimum fee or tax for the privilege granted of doing business in the State is required of all corporations. The sole question is whether the payment of such a minimum fee or franchise tax may be required for the privileges granted by the State. The fact that the tax might be less if computed on a different basis has no bearing on this question.

The argument of appellee on this point ignores the fact that the statute provides a minimum excise or franchise tax for the privilege granted of doing business in the State, and that if the franchise is sufficiently used or exercised in the State to produce a larger tax on the basis of such use, then the larger amount must be paid for the exercise of the privilege. The selected measure in each case is merely a matter of convenience in computing the tax for the privileges granted by the State and affords no basis for the assumption that it applies to property outside the State, and in fact it does not do so.

V.

The Statute and its application to Appellee does not deprive it of the Equal Protection of the Laws.

The principal contention of appellee appears to be that the statute discriminates against it, contrary to the equal protection clause of the Fourteenth Amendment.

This contention did not receive any support from the Circuit Court and apparently has no foundation in fact.

Appellee refers to discrimination in several ways between corporations, both foreign and domestic, and cites various authorities, but none of them appear to be in point here. There can be no such discrimination in this case, as the statute applies alike to both foreign and domestic corporations in the same circumstances.

Appellee complains that the statute discriminates against it because it is required to pay the minimum fee for the privilege granted of doing business in the State, while some other corporations which exercise their franchises to a much greater extent, may pay a fee or tax measured by the proportion of capital stock used in the State. This in fact results in a higher tax being paid by such other corporations and certainly would not seem to discriminate against appellee, which pays a less tax in proportion to the capital stock which it has the privilege of using in the State.

Appellee admits that a franchise tax fixed as provided by Section 107 may bear "a fair relation" to the value of the privilege granted to do business, but urges that the fee or tax measured on the basis provided by Section 105 bears "a more true relation" to the value of the franchise. Appellee therefore concludes that a tax

should be computed only on the latter basis, as having a more true relation to the value of the privilege and that no tax on any other basis should be imposed.

When appellee admits that the franchise tax imposed in this case may bear a fair relation to the value of the privilege granted of doing business in the State, it concedes that the tax is imposed on a valid basis. It is immaterial that appellee may believe that some other basis for computing a tax bears a more true relation to the value of the privilege granted or exercised. The State is not required to select a method which may be considered the most reasonable and fair basis for computing franchise taxes imposed upon corporations. It is only required to select a method which bears some relation to the value of the privilege granted. (*New York* v. *Latrobe*, 279 U. S., 421, 427). It is admitted by appellee that this has been done and if so, the statute is not arbitrary, but is reasonable and valid.

The contention that the statute is discriminatory because it fixes two "bases" for a franchise tax, merely confuses the minimum franchise tax for the privilege granted, with the larger tax which may be imposed upon the exercise of the privilege . These provisions are applicable under different conditions and apply equally in all cases without favor or discrimination in the case of any corporation to which the respective provisions are applicable.

Appellee complains here, as it did in the Court below, that these provisions as applied discriminate against it and in favor of corporations with a less amount of issued stock. This contention was referred to and answered by the learned Judge of the District Court in stating his views in this case. Appellee is apparently irritated by the obvious answer made and clearly misconstrues the views expressed by him. Its comment is not justified by the views stated or by the facts in the case.

The difficulty with appellee here is that it considers this tax essentially as a property tax, or as a tax according to the value of property and business, and not as an excise or franchise tax. For that reason, it insists that the tax should be computed only on the part of its capital employed in the State, without any regard to the amount of its capital or the value of the privilege granted by the State. The value of the privilege granted has a direct relation to the amount of capital which may be used and which may be considered to a reasonable extent in fixing the amount of tax to be paid .

It is urged that most foreign corporations pay a franchise tax upon the basis of the part of their capital represented in the State, but appellee is required to pay on a different basis. In so doing, such corporations in fact pay a larger tax than appellee in proportion to their issued capital stock. This is due to the fact that

they use a larger part of their stock in the State, but the payment of such larger tax by them affords no ground for any claim of discrimination against appellee.

The State does not require corporations having a large amount of capital to bring more of their property and business into the State than small corporations, but only requires them to pay a reasonably limited amount for the privilege granted of using their capital in local business in the State. The amount of property and business in the State does not determine the amount of the tax in any case, but the issued stock only is considered in determining the value of the privilege granted or exercised in the State.

For example, a corporation having ten times as much capital as appellee, but having the same amount of property and business in Illinois and other states respectively, would be required under Section 105 to pay ten times the amount appellee contends it should pay for having the same amount of property and business in the State. On the other hand, a corporation having the same amount of capital as appellee, and the same amount of property and business in Illinois, but with only one-tenth of the total amount of property and business of appellee, would pay ten times as much tax as appellee contends it should pay under Section 105.

Appellee suggests that its minimum fee or charge for the privilege of doing a local business should not be over $10, the same as the minimum amount payable by a corporation having capital stock of less than $50,000.00. In other words, although appellee admits that its issued stock has some relation to the value of the privilege granted to it by the State, it would pay the same fee for such privilege as a corporation having capital stock amounting to less than $50,000. There is certainly no consistency in such a claim.

It is also urged by appellee that as an interstate carrier, it is subject to the Transportation Act and could not abandon or increase its property in Illinois without securing a certificate therefor from the Commission. The regulation of the business of appellee by the Commission, in so far as it pertains to interstate commerce, has no bearing upon the power and authority of the State to grant the right or privilege of doing a local business in the State. The two respective authorities apply to different rights and activities and have no necessary relation to each other.

This case does not involve a question of classification in the sense referred to by appellee. There is no difference in treatment in the case of appellee from other corporations. All of them are required to pay

at least the minimum fees fixed by the statute for maintaining the privilege of doing a local business in the State. The fact that some other corporations are required to pay proportionately larger fees on a different basis for exercising their franchise in the State to a much greater extent than appellee has done, does not affect it and therefore is no ground for complaint.

Appellee quotes from the case of *Royster Guano Co.* vs. *Virginia,* 253 U. S., 412, but that was merely a case of unintentional discrimination between domestic corporations and is in no way applicable here. Neither is the case of *Southern Railway Co.* vs. *Greene,* 216 U. S., 415, in which there was the discrimination of a higher tax against foreign corporations than domestic corporations were required to pay for substantially the same privileges.

The case of *Hanover Ins. Co.* vs. *Carr,* 272 U. S., 414, likewise involved a higher tax on foreign insurance corporations than domestic corporations were required to pay, which is not in question here. Neither is there any question here of requiring foreign corporations to submit to any unconstitutional provision as a condition of being permitted to do a local business, and therefore the quotation on that point from *Looney* vs. *Crane Co.,* 245 U. S., 184, is not applicable here.

The Court in the *Airway* case does not hold that the fee must be measured by the value of the privilege for which it is imposed, but merely states that some relation to such value is a reasonable requirement, as shown by the quotation from that case by appellee. This statement is construed by appellee to require a "fair relation" to the value of the privilege, which it here urges does not exist. This claim is nullified by appellee's prior admissions on pages 23 of its brief, which indicate that such a fair relation does exist between the tax imposed and the privilege granted by the State.

The statute involved in the case of *International Shoe Co.* vs. *Shartel,* 279 U. S. 429, measured a tax for the exercise of the franchise by the proportion of the stock used in the State, in the same way as Section 105 of the Act here measures the tax for the exercise of the franchise in the State. The approval of a tax for such a privilege on that basis has no bearing on the basis of a minimum fee or tax for the privilege of maintaining the right to do business in the State. None of these cases indicates that there is any discrimination against appellee. The statute is applied equally to all corporations and consequently does not deny the equal protection of the laws to appellee or any other corporation.

VI.

The Cases cited and relied upon by Appellant sustain the Validity of the Statute and the Tax imposed.

A special effort is made by appellee to show that the case of *General Railway Signal Co.* vs. *Virginia*, 246 U. S., 500, is not applicable here. The claim that it was an admission tax, and therefore different from the tax here, is not sound. The tax imposed in that case was not only for the privilege of being admitted, but for actually doing a local business in the State. The tax here imposed is for maintaining the privilege of doing a local business and actually doing such business to a limited extent. There is no distinction in principle between the two cases and no reason is shown why the same rule should not apply.

The statement that the tax there was sustained "for lack of a more true and better basis for the tax," suggests a novel ground for sustaining the tax and the statute under which it was imposed. It indicates again appellee's view that the tax here and the statute under which it was imposed should be held invalid, merely for the reason that in such event the tax might be computed on another basis, which appellee conceives to be more fair and equitable. It need hardly be said that the constitutional questions cannot be disposed of upon any such basis of convenience or comparison.

The suggestion also that in this case the "scale of minimums" tend to raise the amount which appellee would otherwise be required to pay under the first provision of Section 105, as a reason for holding the tax and statute invalid, is of the same character. The right of the State to impose a minimum fee or franchise tax for the privileges granted by it cannot be affected by any other provision of the statute which is intended to impose larger fees upon a greater exercise of the franchise in the State by a corporation.

The fact that the question of the equal protection of the laws did not arise in the cases referred to, as stated by appellee, merely indicates that there was no ground for raising any such question in those cases. The same is true in the present case. The statute is general in its application to all alike in the same circumstances. The situation is not made any different by reason of the fact that the statute provides for computing a fee on the basis of the exercise of the franchise in the State, when it will produce a larger amount than the minimum fees specified.

The maximum limit here in the amount of the tax provided on the minimum fee basis, is the same in principle as the maximum limit provided by the Massachusetts statute, which was applied in the *Baltic Mining Co.* and *Cheney Bros. Co.* cases. The statute here, how-

ever, as in the *Signal Co.* case, has further limitations in the tax imposed to certain graduated amounts of issued capital stock, which provide much greater limitations than the mere maximum limit provided by the Massachusetts statute. In fact, that statute made no limitation or restriction in the tax up to $2000, and thus required all corporations having authorized capital stock of $10,000,000 or less to pay a tax measured by the entire authorized amount of their capital stock. The unlimited application of the statute in such cases is evidently one reason for its disapproval in subsequent decisions of this Court.

The provisions of a statute which limit and restrict its operation to a reasonable charge for the privilege granted by the State, thus making it compatible with the constitutional provisions, were referred to by the Court in *Looney* vs. *Crane Co.*, as quoted by appellee, and illustrated by the cases therein cited on this point. Those cases have been discussed in our original brief and were there shown to be applicable to the statute involved in the present case.

Appellee attempts to distinguish some of the cases referred to by us on the ground that they involved domestic corporations, but other cases relied upon to the same effect also involved foreign corporations. The con-

stitutional provisions apply equally to both domestic and foreign corporations, and there is no material distinction in the principle of a minimum fee or franchise tax in either case. Moreover, the statute here applies to both kinds of corporations alike, for maintaining the same privileges in the State and no distinction can be made on that ground.

The case of *Hump Hairpin Mfg. Co.* vs. *Emmerson,* 258, U. S., 290, which involved the application of a franchise tax to a foreign corporation in Illinois, has been repeatedly approved by this Court and never discredited in any way (*Western Cartridge Co.* vs. *Emmerson,* 281 U. S., 511). The recent decision of the Illinois Court in the *O'Gara Coal Co.* cases, following the decision of this Court in the *Airway* case and involving a different situation, is not in point or material here. *The Hump Hairpin* case and other cases cited by us showed clearly that the statute does not impose any burden on commerce or violate any constitutional right of appellee.

The case of *Cudahy Packing Co.* vs. *Hinkle,* 278 U. S., 460, imposed both an admission fee and annual franchise tax on the basis of authorized capital stock, without regard to the amount issued or which might be used by the corporation in the state. The statute here is limited to issued stock only, and fixes a small tax within strictly graduated limits, with a very low maximum amount of

tax for large corporations. The tax is closely related to the privileges granted and is very reasonable in amount. The statute and the tax imposed have been fully sustained by the decisions of this Court in similar cases.

VII.

The Circuit Court of Appeals did not correctly interpret and apply the Statute imposing the Tax.

Appellee has referred to the quotation by appellant from the opinion of the Circuit Court in this case, as indicating that it had misconceived the nature and effect of the tax. The quotation was taken from the opinion as it appears in the record in this case (R. 53). Although a change was made in publishing the opinion, as suggested by appellee, that fact does not alter the opinion of record. Moreover, this change indicates an erroneous understanding of the application of the statute, which apparently had a material bearing upon the conclusion of the Court.

The opinion of the Circuit Court would not of course invalidate a correct judgment. The opinion in this case apparently does show, however, that the judgment is based on erroneous grounds and therefore indicates that the judgment itself is erroneous. The grounds of the opinion are fully discussed in our original brief, at pages 26-30, and need not be repeated here.

For the reasons stated in appellant's original brief, and here referred to again, it is most respectfully but earnestly urged that the decision and judgment of the Circuit Court of Appeals in this case is erroneous and should be reversed and that the decree of the District Court should be affirmed by this Court.

Respectfully submitted,

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IN THE

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OCTOBER TERM, A. D. 1929.

WILLIAM J. STRATTON, Secretary of the State of Illinois,
Appellant,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
a Corporation,
Appellee.

Appeal from the United States Circuit Court of Appeals
for the Seventh Circuit.

STATEMENT, BRIEF AND ARGUMENT FOR APPELLEE.

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No. 98.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1929.

WILLIAM J. STRATTON, Secretary of the State of Illinois,
Appellant,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
a Corporation,
Appellee.

Appeal from the United States Circuit Court of Appeals
for the Seventh Circuit.

STATEMENT, BRIEF AND ARGUMENT FOR APPELLEE.

STATEMENT OF THE CASE.

May It Please the Court:

This case, under the title of St. Louis Southwestern Railway Company, appellant, v. Louis L. Emmerson (the predecessor in office of W. J. Stratton), Secretary of State of the State of Illinois, is reported in 30 Federal (2d) 322 (C. C. A.) and 27 Federal (2d) 1005 (D. C.).

Appellant correctly states the facts, but in order that the inapplicability of the authorities relied on by appellant may be made the more apparent, a more detailed explanation of the pertinent provisions of the Illinois Corporation Act (which are set out in full under Appendix A) is necessary.

All references to the sections of the statute are to Chapter 32, Cahill's Revised Statutes Illinois 1927, and Chapter 32 of Smith-Hurd's Revised Statutes Illinois 1927. The sections have the same numbers in each statute.

The State of Illinois exacts, and, at the time this controversy arose, exacted, from domestic corporations (Sec. 96) an "initial" (incorporation) fee, but once paid on its stock as issued, and also an **annual** franchise tax for the remainder of the first year (Sec. 129) and yearly thereafter (Secs. 105-107).

Section 80 provides that every foreign corporation shall, "before it transacts any business or maintains an office in this state, procure a certificate of authority therefor from the Secretary of State."

Section 81 provides the form of such application in the manner of a questionnaire covering information from which the Secretary of State may compute the proportion of its capital stock which will be represented in Illinois during the remainder of the first calendar year of its admission by the corporation's estimate of its business to be done within and property to be brought into the state during that period, and by a like estimate of its business and property in other states during the same period.

Section 101 provides for an admission tax (the complement of the "initial" or incorporation fee charged domestic corporations by section 96), requiring a foreign corporation to pay for a "certificate of authority to do business in Illinois, the same fees provided by this to be paid by a similar corporation incorporated under the laws of this state. * * * All such fees shall be based upon the proportion of its issued capital stock represented by business transacted and property located in Illinois."

In addition to the admission tax of the foreign corporation, a franchise tax is exacted of it, covering the remainder of the first year of its admission (Sec. 129), based on the proportion of its issued capital stock represented in Illinois, as determined by the estimate stated in the application, pursuant to section 81.

Having admitted foreign corporation, as a quasi citizen, into the state, the State of Illinois requires both foreign and domestic to file an annual report; section 102 providing that

> "Each corporation, including railroads, domestic and foreign, * * * shall make a report in writing to the Secretary of State between the first day of February and the first day of March of each year on the forms to be prescribed and furnished by the Secretary of State. That part of the annual report relating to property and business shall be made as for the calendar year ending December 31st preceding. * * * **Such annual report shall also disclose such facts as are necessary to enable the Secretary of State**

to ascertain the proportion of its capital stock represented by business transacted and tangible property located in this state and such other information as may be necessary or appropriate in order to assess the annual license fee or franchise tax." * * *

On the basis of the annual reports filed by foreign and domestic corporations the Secretary of State of Illinois is required to determine the proportion of the capital stock represented by "business transacted and property located" in the state.

Section 106 provides that, "In ascertaining the amount of the issued capital stock represented by business transacted and property located in this state, the sum of the business of any foreign or domestic corporation transacted in this state and the total property of such corporation located within this state shall be divided by the sum of the total business of the corporation and the total property of the corporation wherever situated."

Having determined the amount of capital stock of each foreign and domestic corporation—so represented in Illinois, the Secretary of State computes their annual franchise taxes as is provided by paragraphs 105 and 107 of the statute and as set forth in appellant's brief.

It might be further noted that the bill avers and the statute provides that on the failure of a corporation to pay the annual franchise tax the Secretary of State could and would forfeit the right of such corporation to do business in Illinois (Sec. 92). The statute provided for

divers penalties, against the corporation and its officers, account their failure to comply with the statute (Sec. 114) (Rec., p. 5).

The annual report on which the tax in question was based was filed, as required by the statute (Sec. 102), in February, 1927, and covered property owned and business done in the state during the calendar year of 1926.

The statute (Sec. 112) provided that between the 1st day of February and 15th day of June the Secretary of State should mail a notice to each corporation, notifying it of the amount assessed against it for the ensuing year; and in this case, for the year beginning July 1, 1927, and ending June 30, 1928.

The statute under which this cause arises was amended by act approved May 12, 1927, and effective that date, an emergency having been declared (Rec., p. 25) (Illinois Laws 1917, pages 359-360) because the prior statute had been declared unconstitutional.

> See O'Gara Coal Co. (Beatrice Creamery Co., No. 18177) v. Emmerson, 326 Ill. 18 at 44.

Appellee contended in the District Court (Rec., p. 30), in the Circuit Court of Appeals (Rec., p. 40) and here contends, that, as applied to it, under the facts pleaded, paragraphs 105 and/or 107 of the Illinois Corporation Act are void, in that they take from appellee rights guaranteed to it by the Constitution of the United States:

1. Unreasonably burdening and directly taxing appellee's commerce between the states in violation of Section 10 of Article I of the Constitution of the United States.

2. Taxing appellee's property and business outside the State of Illinois, and thereby depriving appellee of its property without due process, contrary to the Fourteenth Amendment to the Constitution of the United States.

3. Discriminating against appellee in favor of other foreign and domestic corporations, thereby denying it the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

BRIEF.

I.

As to appellant, the tax of one thousand ($1,000.00) dollars resulting from the application under the proviso of section 105 of the scale of minimum amounts of tax provided by Section 107 of the General Corporation Act is void, being a direct, as well as an unreasonable, burden on the interstate commerce engaged in by appellee, in that the annual franchise tax exacted of appellee on that portion of its issued capital represented in Illinois and amounting to $135.21 is the maximum which can be exacted of it on that part of its capital stock so represented in Illinois and when the appellant assessed an additional tax of $864.79; such additional amount necessarily fell partly on the interstate business conducted by appellee and amounted to a direct tax and an unreasonable burden on appellee's commerce between the states.

Western Union Tel. Co. v. Kansas, 216 U. S. 1;
Ludwig v. Western Union Tel. Co., 216 U. S. 146;
Looney v. Crane Co., 245 U. S. 178;
International Paper Co. v. Mass., 246 U. S. 135;
Air-Way Electric Co. v. Day, 266 U. S. 71;
Cudahy Packing Co. v. Hinkle, 278 U. S. 460.

II.

Appellee is likewise deprived of its property without due process of law, within the inhibition of the Fourteenth

Amendment, because when computed on the basis of the portion of appellee's issued capital stock represented by property and business in Illinois, the franchise tax would amount to $135.21, and when appellant assessed a tax of $864.79 in addition thereto, such additional assessment fell on appellee's capital stock, which represented its property in other states, and amounted to an unlawful tax upon appellee's property in other states.

Western Union Tel. Co. v. Kansas, 216 U. S. 1;
Ludwig v. Western Union Tel. Co., 216 U. S. 146;
A. T. & S. F. Ry. v. O'Connor, 223 U. S. 280;
Looney v. Crane Co., 245 U. S. 178;
Air-Way Elec. App. Corp. v. Day, 266 U. S. 71;
Cudahy Packing Co. v. Hinkle, 278 U. S. 460.

III.

As applied to appellee, Pars. 105 to 107 of the Illinois Corporation Act deny it the equal protection of the laws, discriminating against it and in favor of other domestic and foreign corporations having like business and assets in Illinois, but a smaller amount of issued capital stock.

IV.

As to a corporation of its own creation, the state may impose any tax upon its franchise to be a corporation which the state desires, even though the corporation is engaged in interstate commerce, as in such a case the tax is not upon interstate commerce, but upon the privilege

of existing and doing business as a corporation, which the state has authority to tax by the measure of its capital stock, which, in part, may represent property or business not subject to the state's taxing power.

Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50;
K. C. M. & B. R. R. v. Stiles, 242 U. S. 111;
K. C. Ft. Scott & M. R. R. v. Kansas ex rel. Botkin, 240 U. S. 227.

The franchise tax involved in this appeal is also much different than an incorporation fee exacted of a domestic corporation or its complement, an admission or "initial" fee exacted by the state from foreign corporations seeking admittance (there being but one collection of the tax), as to which different rules apply.

Hanover Ins. Co. v. Harding, 272 U. S. 494;
Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50;
People of State of New York v. Latrobe, ... U. S ..., 73 L. Ed. 407.

Authorities, cited by appellant, which are distinguishable on the foregoing grounds, are:

General Ry. Signal Co. v. Va., 246 U. S. 500;
K. C., Ft. Scott & M. R. R. v. Kansas ex rel: Botkin, 240 U. S. 227;
K. D. M. & B. R. R. v. Stiles, 242 U. S. 111;
Air-Way Elec. Appliance Co. v. Day, 266 U. S. 71;
Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50;
Southern Ry. Co. v. Greene, 216 U. S. 400;
Royster Guano Co. v. Virginia, 253 U. S. 412.

As applied to appellee, the statute violates the Equal Protection clause, because the tax is not limited to that part of appellee's capital stock justly apportionable to the State of Illinois. (See International Shoe Co. v. Shartel, ... U. S. ..., 73 L. Ed. 411, 413.)

A franchise tax against a foreign corporation and method of fixing the same must bear a reasonable relation to the value of the privilege granted.

Air-Way Elec. v. Day, supra.

Although having power to exclude foreign corporations, a state cannot limit entry on condition that such corporations waive any of their constitutional rights.

Looney v. Crane, 245 U. S. 178, Op. 187-8;
Western Union v. Kansas, 216 U. S. 1, Op. 47-8;
Pullman Co. v. Kansas, 216 U. S. 56, Op. 63-4;
Hanover Fire Ins. Co. v. Carr, 272 U. S. 494, Op. 507;
Frost v. R. R. Comm., 271 U. S. 591, at 593-4, 599.

The Illinois Supreme Court has announced that the purpose of Section 105 of the General Corporation Act of Illinois is to exact an annual license fee or charge from foreign corporations "for the privilege of doing business in the State of Illinois, based upon the proportion of their capital stock represented by their property and business in this state."

Armstrong v. Emmerson, 300 Ill. 54 at 64.

Appellant's authority to issue stock or the number of shares it may have issued and outstanding does not depend upon the laws of Illinois. Its sole authority in that respect depends upon the laws of Missouri, under which it was created.

Air-Way Electric Appliance Co. v. Day, 266 U. S. 71;
Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50;
O'Gara Coal Co. v. Emmerson, 326 Ill. 18 at 32.

ARGUMENT.

I.

The theory and fundamental basis of the Illinois Franchise Tax Statutes is to require all corporations to pay an annual franchise tax of 5 cents per $100.00 on that part of its issued capital stock represented by property owned and business done in Illinois.

Section 101 of the Illinois Corporation Act provides that:

> "All (the annual franchise fees were included) such fees shall be based upon the proportions of its issued stock represented by business transacted and property located in Illinois."

Section 102 provides for an annual report which will disclose

> "such facts as are necessary to enable the Secretary of State to ascertain the proportion of its capital stock represented by business transacted and tangible property located in this state, and such other information as may be necessary or appropriate in order to assess the annual license fee or franchise tax."

The Illinois Supreme Court has announced that the purpose of the General Corporation Act of Illinois is to exact an annual license fee or charge from foreign corporations "for the privilege of doing business in the State of Illi-

nois, based upon the proportion of their capital stock represented by their property and business in this state."

Armstrong v. Emmerson, 300 Ill. 54, at 64.

The scale of **minimums** of section 107 on its face applies only to corporations without either capital assets or business in the State of Illinois. Clearly such corporations (if foreign) must be regarded as being in the state without necessity or purpose. Having no property or business in the state, there would be nothing, to defend which constitutional guarantees could attach.* Indeed, one of the grounds of revoking the authority of a foreign corporation to do business in Illinois is:

"If such corporation is transacting no business in Illinois and has no tangible property in this state."

Ch. 32, Sec. 92 (2) Cahill's Revised Statutes 1927.

The proviso of section 105, requiring all corporations to at least pay the scale of minimums set forth in section 107, is clearly of a secondary nature, and, as applied to appellee, in conflict with the fundamental theory of the statute.

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*Such corporations would not be in a position to raise the question as one who challenges the validity of a state statute, at least as violating the equal-protection clause, cannot rely on theoretical inequalities or such inequalities as do not affect him.

Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50, 54-5 (citing Western Union Tel. Co. v. Atty.-Gen., 125 U. S. 530, 552-3; Gast Realty & Investment Co. v. Schneider Granite Co., 240 U. S. 55-60);

Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 121.

We say that the actual effect as applied to appellee of Sections 105 and 107 of the Illinois Statutes is as follows:

The State of Illinois has fixed a fair and reasonable measure of the value to foreign corporations (which have been admitted and have become quasi citizens of the state) of their right to carry on business in the state, viz.: The portion of their issued capital stocks represented in Illinois by property and business in the state; and the State of Illinois has fixed a tax of one-twentieth of 1 per cent on such portion of the issued capital stock, so represented in Illinois (section 105), but to certain corporations, including appellee, who happen to possess but little business and property in the state, but happen to have a large issued capital stock, the state arbitrarily says: "You must pay more" (sections 105-107).

In determining the actual effect and substance of the statutes, the form is to be disregarded. The actual results following its application control it.

> "The controlling test is to be found in the operation and effect of the law as applied and enforced by the state" (Op. 510).

See

> Hanover Fire Ins. Co. v. Carr, 272 U. S. 494;
> Western Union Tel. Co. v. Kansas, 216 U. S. 1, 30;
> Ludwig v. Western Union Tel. Co., 216 U. S. 146.

II.

The Question Involved in This Case.

The question involved in this case is really not (as stated by appellant, p. 11 of Argument) "whether or not the state may require a corporation organized or admitted to do business in the state to pay a minimum fee or franchise tax, as provided in sections 105 or 107, for granting the privilege to it of doing business in the state, during the year, although it may not actually exercise its franchise in the state to a sufficient extent to produce such amount of tax, at the rate specified in section 105," but is

May the state, having admitted a foreign corporation as a quasi citizen to do business within its boundaries, levy an annual franchise tax on the basis of its issued stock, in excess of that portion thereof actually represented by property and business in the state? and

May the state discriminate between domestic and foreign corporations to the extent that it may require foreign corporations, with large issued capital (but a small portion of which is represented in Illinois), to pay a larger franchise tax, based on a scale of minimums, while requiring other corporations of smaller capital to pay on the basis of that portion of their capital stock apportioned to the state on the portion of property owned and business done in the state?

May the State of Illinois require foreign corporations (which it has admitted) with large issued capitalizations,

to thereafter bring a fixed amount of their assets and business into the state or else pay a large franchise tax, the same as if such foreign corporations had brought such fixed amount of their capital and business into the state?

III.

As to Appellee the Tax of One Thousand ($1,000.00) Dollars Resulting From the Application, Under the Proviso of Section 105 of the Scale of Minimum Amounts Provided by Section 107 of the General Corporation Act, Is Void, Being a Direct, as Well as Unreasonable, Burden On the Interstate Commerce Engaged in by It.

By virtue of clause 3 of Section 8 of Article I of the Constitution the State of Illinois is prohibited from laying any direct or unreasonable tax on interstate commerce.

The prohibition was first considered with reference to a franchise tax in the case of Western Union Tel. Co. v. Kansas, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. ed. 423, where the Court specifically held void, as being in violation of the commerce clause, a Kansas statute requiring foreign corporations (before that time admitted to intrastate business) to pay as a franchise tax a fixed (one-tenth of 1 per cent) per cent of their authorized capitals. The Supreme Court reasoned that as the whole of the capital stock represented the whole of the corporation's business, and as only a part of the corporation's capital, property and business was in Kansas, the tax on all of its capital stock was, of necessity,

a tax on all of its property and all of its business, which included its interstate business; by reason whereof the tax was in part a direct burden, a direct tax, on the corporation's business in interstate commerce, and therefore void. It is only where the burden is indirect or incidental that the commerce clause would not be violated unless the burden be unreasonable.

Here, as in the Western Union Co. case, the tax is a direct burden on the interstate commerce conducted by appellee, because one hundred thirty-five and 21/100 ($135.21) dollars is the tax which would be due from appellee on the proportion of its capital stock represented by property owned and business done in Illinois. The balance of its capital stock is represented by property and business in other states. The appellee demands eight hundred sixty-four and 79/100 ($864.79) dollars additional. If paid, then, of necessity, it is a tax and a direct burden upon all of appellant's property and business, including appellant's interstate commerce, and it is therefore void.

The case of Air-Way Electric Appliance Co. v. Day involved franchise tax based on the portion of the authorized stock of a foreign corporation (only a part of which was issued), represented by property owned and business done in the taxing state. It was held that the tax based on the authorized but unissued stock, of necessity, fell, in part, on issued stock which represented commerce between the states carried on by the corporation.

"As some of the outstanding shares are represented by plaintiff's interstate business the application of the rate to all the shares, or to a number greater than the total outstanding, necessarily amounts to a tax and direct burden upon all the property and business, including the interstate commerce, of the plaintiff (International Paper Co. v. Massachusetts, supra, 142). We hold that the act violates the commerce clause."

Air-Way Electric Appliance Corp. v. Day, Op. 226 U. S. 71.

The actual effect of sections 105-107 of the Illinois statute is the same as the actual effect of the Ohio statute. The body of section 105 fixes a tax on the basis of property owned and business done in Illinois. The proviso of section 105 singles out a class of corporations (including appellee) and places an additional burden and tax on them—the scale of minimums provided by section 107. This additional burden and tax must, in part, fall on and directly burden appellee's commerce between the states.

If the State of Illinois had levied a tax based on the authorized stock of appellee (a part of which is unissued), it would be void. If the tax was based on any part (but not all) of the authorized but unissued stock, we do not believe the Court would have any hesitancy in declaring it to be void. Here, the tax is based, first, upon appellee's issued stock represented in Illinois, and then an additional amount is arbitrarily added thereto. There is no difference, in substance, between the decided cases and this.

After admission of a foreign corporation the state cannot impose an annual franchise tax, where the sole business conducted by the corporation within the confines of the state was in interstate commerce.

Ozark Pipe Line Corp. v. Monier, 266 U. S. 561, Op. 565;
Alpha Portland Cement Co. v. Mass., 268 U. S. 212, Op. 218.

Appellant relies mainly on the case of General Railway Signal Co. v. Virginia, 246 U. S. 500. That case is not in point as is fully demonstrated under VI infra (p. 32.). That case involves an admission, not a franchise, tax, as to which different principles govern. The Virginia statute fixed a scale of **maximum** taxes, which, on the authority of Baltic Mining Co. v. Mass., 231 U. S. 68, was held to save it, as the scale acted to **decrease** or limit the tax in amount.

Section 107 of the Illinois act provides for a scale of **minimum taxes**, acting to **increase** the tax which appellee would otherwise pay on the basis of property owned and business done.

In the General Railway Signal case it was contended that the tax unreasonably burdened interstate commerce. In sustaining the statute, this Court remarked:

"It seems proper, however, to add that the case is on the border line" (Op. 511).

If the Virginia case is "on the border line" as to whether the tax was an unreasonable burden (it was not a direct burden on interstate commerce because, as [1] it did not vary in direct proportion to the amount of stock, and [2] had a limited maximum), then, by reason of the fact that there is a true and fair measure provided by the Illinois statute and available for the computation of the tax, and the further fact that the scale of minimums acts to increase, instead of decreasing, the tax, this case goes over the "border line" into the realm of the unreasonable and is void.

IV.

Appellee Is Likewise Deprived of Its Property Without Due Process of Law, Within the Inhibition of the Fourteenth Amendment.

It is the old and well-established rule that a state cannot, consistent with the due-process clause, levy a tax on property without its territorial limits.

St. Louis v. Wiggins Ferry Co., 11 Wall. 423, 20 L. ed. 192;
New York, L. & E. R. R. v. Penn., 153 U. S. 628, 14 Sup. Ct. 952, 38 L. ed. 846;
Tappan v. Merchants Natl. Bank, 19 Wall. 490, 22 L. ed. 189.

The rule was first applied to a corporation franchise tax in the case of Western Union Tel. Co. v. Kansas, 30 Sup. Ct. R. 190, 54 L. ed. 355, where the Court held void a

Kansas statute requiring foreign corporations, which had been admitted to do business in Kansas, as a condition of continuing to do a local business to pay a fixed (one-tenth of 1 per cent) per cent of their authorized capitals. Domestic corporations were required to pay the same fees. The statute was held to deprive the Western Union Tel. Co. of property without due process of law. The Court properly reasoned that the corporation's capital stock represented all of its property situated in other states, as well as in Kansas, and hence, a tax based on all of the capital stock was a tax on property located in all such states, violating the due-process clause.

So here, as the Illinois statute is applied to appellee, its property located without the State of Illinois is subjected to an Illinois tax. For appellee's tax, based on the proportion of its issued stock, represented by property and business in Illinois, would be one hundred thirty-five and 21/100 ($135.21) dollars. That sum would be the amount of tax on appellee's property and business in Illinois. The State of Illinois demands eight hundred sixty-four and 79/100 ($864.79) dollars more. Such additional exaction must necessarily fall on that portion of appellee's stock which represents its business and property, located elsewhere, and the tax is void under the due-process clause.

The theory of the case of Western Union Tel. Co. v. Kansas has been reaffirmed and applied in

Ludwig v. Western Union Tel. Co., 216 U. S. 146;
A. T. & S. F. Ry. v. O'Connor, 223 U. S. 280;

Looney v. Crane Co., 245 U. S. 178;
International Paper Co. v. Mass., 246 U. S. 135;
Air-Way Elec. App. Corp. v. Day, 266 U. S. 71;
Cudahy Packing Co. v. Hinkle, 278 U. S. 460.

V.

Sections 105-107 of the Illinois Corporation Act, On Their Face, as Well as in the Application, Act to Deprive Appellee of the Equal Protection of the Laws.

The Circuit Court of Appeals did not find it necessary, in its opinion, to mention the third, and, we believe, the strongest, ground upon which appellee assailed the Illinois statute.

As applied to annual franchise taxes, it has been specifically held that a state cannot consistently, with the equal protection of the laws clause, discriminate in any way:

(a) Between foreign corporations of the same class, which it has admitted into the state.

Air-Way Electric Appliance Co. v. Day, 266 U. S. 71, 71 Sup. Ct. R. 85, 69 L. ed. 10;
Hanover Ins. Co. v. Carr, supra, Op. 514;
O'Gara Coal Co. v. Emmerson, 326 Ill. 18, at 32.

(b) Discriminate, in any way, against such foreign, and in favor of domestic, corporations.

Southern Ry. Co. v. Greene, 216 U. S. 400, 418, 54 L. ed. 536-542.

(c) Nor between domestic corporations.

Royster Guano Co. v. Virginia, 253 U. S. 412.

And any annual franchise or privilege tax (assuming it is not discriminatory), exacted of foreign corporations, must have a reasonable relationship to the value of the privilege granted.

Air-Way Electric Co. v. Day, 266 U. S. 71, 71 Sup. Ct. R. 85, 69 L. ed. 10, at 13.

The statute, on its face, as well as by its application to appellee, discriminates against appellee and in favor of other corporations, foreign and domestic, who are assessed and pay a franchise tax of 5 cents per $100 on that portion of their issued capital stock represented by property and business in Illinois.

Even though the effect of the statute be treated as contended by appellant, an apparent discrimination against appellee exists.

Appellant says that the amount of issued stock bears a fair relation to value of the annual franchise to do business. This may be so. But the ratio of property owned and business annually done bears a more true relation to the value of the franchise, and the state discriminates against appellee by taxing some corporations on the one basis (the one having a real direct and more true relation to the value of the privilege) and taxing appellee a propor-

tionately greater amount on a more remote, arbitrary and less true basis.

On its face, therefore, the statute is discriminatory because it fixed two "bases" for a franchise tax, which, when applied, assess taxes in different amounts, acting more favorably towards some corporations and less favorably towards others, including appellee.

We say, to justify this statute, appellee must be in receipt **from the State of Illinois** of some actual and substantial privilege or advantage which other corporations, paying less or proportionately less, do not receive. No such benefit has been suggested by appellant.

Not only do the statutes on their face discriminate against appellee, but, in their application, appellee is discriminated against.

The Chancellor correctly outlines the basis of the discrimination when he says:

> "Plaintiff complains that it is discriminated against because another corporation with an issued capital stock of $270,423.00, and having all of its property and business in Illinois, would be required to pay a tax of but $135.21, yet the State of Illinois insists upon plaintiff paying a sum of $1,000.00 for doing the same amount of business and having the same amount of property in the State of Illinois. It similarly complains because another corporation, with a capital stock of $1,000,000.00, and $270,423.00 of that capital represented in Illinois, would pay only $135.21, while plaintiff is required to pay $1,000.00" (Rec., p. 36).

The Chancellor then says that appellee is not discriminated against, in effect, because all corporations with the same issued stock as it, and, having the same property and business in Illinois as it, would pay the same tax; and that if appellee had issued stock in a smaller amount it would not be compelled to pay any greater tax than the smaller corporation (Rec., p. 36).

In effect, this amounts to saying: "It is true, the State discriminates against you, but you cannot complain, as the State also discriminates against every corporation which has a large issued capital and a small business in Illinois." This is not a sound answer to the charge. The fact that others are wronged does not make right the wrong done appellee.

We say the Illinois statute here involved clearly discriminates against appellee and in favor of corporations, domestic and foreign, who pay franchise taxes on the basis of the portion of their issued capital, represented by property and business in Illinois.

Is there any fair basis or justification for this discrimination?

What benefit or privilege, desired or sought by appellee, does it receive from the State of Illinois which all other foreign corporations do not also receive?

Appellee's right to be a corporation with authority to issue a certain amount of capital stock, to engage in a certain business, and its invested powers, are all granted to it by Missouri, the state of its incorporation.

"The state, which grants the franchise to be a corporation and authority to issue capital stock, may charge the corporation with an initial fee and an annual franchise tax upon the amount of the capital stock which it grants authority to issue, but it cannot charge a foreign corporation with such fee or tax for the privilege of transacting business within the state based upon its authorized capital. The authority of the foreign corporation to issue stock or the amount of stock it may have outstanding, does not depend upon the laws of Illinois, but upon the laws of the state in which it was organized."

O'Gara Coal Co. v. Emmerson, 326 Ill. 18 (Op. 32).

The sole right which appellee seeks from or receives from the State of Illinois is to enter that state and do a local business.

Notwithstanding the fact that most foreign corporations pay for the privilege of doing a local business on the basis of the portions of their issued capital represented in Illinois—appellee is asked to pay on a different basis—and in justification of such added exaction, it is said that appellee "had the privilege of increasing the amount of its property and business during the next year without paying any additional tax" (Appellant's Brief, p. 16).

To begin with, such is not the effect of the Illinois statute; and, furthermore, the state cannot, as a condition of admission or the continuance thereof, discriminate between foreign corporations with different amounts of issued capital stock, so as to require those of large capital

to bring more of their property and business than they need or desire within the state; or pay a large tax, based on the assumption that they have, will or may bring in such additional property and business.

As pointed out in the statement (pp. 4, 5, ante) the tax in question is based on appellee's annual report of property owned and business done in the calendar year 1926.

The tax is levied for the privilege of doing a local business during the year beginning July 1, 1927, and ending June 30, 1928.

Clearly then, if during the calendar year of 1927, or during the year July 1, 1927, to June 30, 1928, appellee should bring additional property and business into Illinois, it would have no relation to or in anywise be attributable to its payment of the tax here involved. Such subsequent importation of capital and business would only have effect by increasing its tax for the following years.

Once admitted, the amount of issued capital does not bear such a fair relation to the value of the right to do a local business as to justify or permit the application of the amount of such stock as the measure of the annual franchise tax, especially when the state has also provided a more fair and equitable measure by the portion of the issued stock represented by property owned and business done in the state.

Appellant urges that the Illinois statutes are intended to impose only a "reasonable minimum charge upon all corporations, both foreign and domestic, for maintaining

the privilege granted of doing a local business in the state during the next ensuing year" (Argument, p. 21).

A "minimum charge" is often permitted to cover the cost of bookkeeping, collection of tax and the administration of the act. It is usually a nominal amount. It could not reasonably vary according to the issued capitals of the franchise taxpaying corporations. As indicated by section 107 of the statute, this minimum tax should not be over $10.00, that being the minimum amount payable by a corporation having a capital stock of less than $50,000.00.

It is pleaded in the bill of complaint that appellee is an interstate carrier by railroad, subject to and operating under the provisions of the Transportation Act (Rec., p. 3). It cannot abandon its properties in Illinois and cease their operation without first obtaining a certificate of convenience and necessity from the Interstate Commerce Commission.

It cannot build or acquire other properties in Illinois without first securing a certificate of convenience and necessity from the Interstate Commerce Commission. It operates a railroad property located in a number of states and must unavoidably have a large issued capital stock, only a portion of which it can employ in Illinois. We insist that as to all corporations, and particularly as to corporations in appellee's situation, the right to do a local business in Illinois has no value beyond the actual use thereof, which the recipient can or desires to make. To say that the State of Illinois may require such a foreign corpora-

tion to pay a franchise tax actually based on a greater part of its issued capital than is actually represented by property and business in the state, or on a greater proportion (than that represented by property and business) of its issued capital than it can or desires to bring into the state, or else pay a franchise tax based upon such portion of its capital falls flat of its own absurdity.

This difference of treatment cannot be justified as resulting from a proper classification.

> "It is unnecessary to say that the 'equal protection of the laws' required by the Fourteenth Amendment does not prevent the states from resorting to classification for the purposes of legislation. Numerous and familiar decisions of this Court establish that they have a wide range of discretion in that regard. But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. The latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemptions upon grounds of policy" (Op. 415).
>
> "It is obvious that the ground of difference upon which the discrimination is rested has no fair or substantial relation to the proper object sought to be accomplished by the legislation. It follows that it is arbitrary in effect, and none the less because it is probable that the unequal operation of the taxing system was due to inadvertence rather than design" (Op. 416).
>
> Royster Guano Co. v. Virginia, 253 U. S. 412.

"It remains to consider the argument made on behalf of the State of Alabama, that the statute is justified as an exercise of the right of classification of the subjects of taxation, which has been held to be entirely consistent with the equal protection of the laws guaranteed by the Fourteenth Amendment. It is argued that the imposition of special taxes upon foreign corporations for the privilege of doing business within the state is sufficient to justify such different taxation, because the tax imposed is different, in that the one imposed on the domestic corporation is for the privilege of being a corporation, whereas the one on the foreign corporation is for the privilege of such corporation to do business within the state. While reasonable classification is permitted without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed, and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification."

Southern R. Co. v. Greene, 216 U. S. 415, Op. 417.

Without doubt, a state may deny all foreign corporations the right to enter its domain and do a local business, but once it does admit them, then they become quasi citizens and no right guaranteed to them by the Constitution of the United States may be infringed upon.

"In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether

such a charge violates the equal-protection clause of the Fourteenth Amendment, a line has to be drawn between the burden imposed by the state for the license or privilege to do business in the state and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state. With respect to the admission fee, so to speak, which the foreign corporation must pay to become a quasi citizen of the state and entitled to equal privileges with citizens of the state, the measure of the burden is in the discretion of the state, and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the Fourteenth Amendment, but after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind" (Op. 510).

Hanover Ins. Co. v. Carr, 272 U. S. 414-510.

Neither can a state require a foreign corporation to surrender any of its constitutional rights as a condition of its admittance or of the continuance of its right to do a local business.

"Indeed, the cases referred to were concerned in various forms with the identical questions here involved, and authoritatively settled that the states are without power to use their lawful authority to exclude foreign corporations by directly burdening interstate commerce, as a condition of permitting them to do business in the state, in violation of the Constitution" (Op. 188).

Looney v. Crane Co., 245 U. S. 184-188.

"One argument urged against our conclusion is that the relation of a foreign insurance company to the state which permits it to do business within its limits is contractual, and that by coming into the state and engaging in business on the conditions imposed it waives all constitutional restrictions and cannot object to a condition or law regulating its obligations, even though as a statute operating in invitum it may be in conflict with constitutional limitations. This argument cannot prevail in view of the decisions of this Court in well-considered cases" (Op. 517).

Hanover Fire Ins. Co. v. Carr, 272 U. S. 513-517.

The Franchise Tax Demanded of Appellee Has No Fair Relation to the Value of the Privilege Asked and Received by Appellee.

The equal protection of the laws requires that such franchise tax must have a fair relation to value of the privilege for which it is imposed. If it be arbitrary or lacks such reasonable relationship it is void.

In the Air-Way Electric case this Court said:

"The fee determined by the lower court, as well as that fixed by the state officers, is arbitrary. Without holding that such a charge must be measured by the value of the privilege for which it is imposed, it may be said that some relation to such value is a reasonable requirement" (Op. . . .).

Air-Way Electric Appliance Co. v. Day, 266 U. S. 71.

As applied to appellee and weighted by such a test, sections 105-107 of the Illinois statute require appellee to pay a franchise tax which has no fair and reasonable relation to the value of the privilege granted.

The tax is **"not limited to the part of the capital stock justly apportioned to the taxing state."**

> International Shoe Co. v. Shartel, ... U. S. ..., 73 L. ed. 411, 413.

Appellee is therefore denied the equal protection of the laws and the tax and statute, as applied to it, are void.

VI.

General Railway Signal Co. v. Virginia, and Similar Cases—Distinguished.

The appellant relies on the case of General Railway Signal Company v. Virginia, 246 U. S. 500.

That case is clearly not applicable. It involved a different kind of tax, viz., an initial or admission tax, against which the only contention made was that it unreasonably burdened interstate commerce. The State of Virginia apparently did not exact any annual franchise or license fees. The initial tax was payable at the time the foreign corporation was admitted. For lack of a more true and better basis for the tax the Court sustained an admission tax based on a scale of fees not varying directly in proportion to the authorized capital stock of the corporations

admitted, and which had a fixed **maximum** amount. The Court could not say it was a tax on the corporation's capital stock which represented property and business in several states as it did not vary in direct proportion to that stock, and a maximum tax was fixed; which there and in the case of Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 34 Sup. Ct. R. 15, L. ed. 127, tended to keep down the amount of the tax which was paid by the contesting corporations; while in this case the scale of **minimums** tends to raise the amount which would otherwise have been paid by appellee.

In those cases no question of discrimination voiding the tax under the equal protection of the laws clause was raised by the parties or considered by the Court.

In this connection the Court is familiar with the rule that questions (particularly constitutional questions), not specifically raised and urged, will not be considered or passed on by the Court.

> James W. Lusk, Receiver, v. Botkin, 240 U. S. 230;
> Chic. I. & L. Ry. v. Hatchett, 228 U. S. 559.

And persons not adversely affected by the particular operation of a statute, by reason of which its unconstitutionality is charged, cannot raise the point.

> Roberts & Schaeffer v. Emmerson, supra.

The Court's opinion in the General Railway Signal case states:

> "It seems proper, however, to add that this case is on the borderline" (Op. 511).

The Virginia statute did not provide a fee for some corporations, measured by their property and business in the state, and a fee for others, measured by their issued capitalization, thereby discriminating between such two classes of corporations.

The General Railway Signal Company case holds only that an entrance fee of $1,000.00, exacted of a foreign corporation for privilege of doing a local business, standing alone, is not a direct tax on interstate commerce and was not, under the circumstances, so arbitrary as to amount to an unreasonable burden on interstate commerce.

Appellant also relies upon the language in the case of Baltic Mining Co. v. Mass., 231 U. S. 68, 34 Sup. (Ct. R. 15, 58 L. Ed. 134), where the Court sustained a Massachusetts statute which levied an annual franchise of one-fiftieth of 1 per cent on the stock of foreign and domestic corporations, with the proviso that in no case should the tax exceed the sum of two thousand ($2,000.00) dollars. The maximum therein fixed was held to save the statute, as it limited or diminished the amount of the tax to a certain **maximum**. It is a very different thing in operation to section 107 of the Illinois statute, which acted to increase the tax by fixing a scale of **minimums**. This par-

ticular difference between the two types of statutes was pointed out by your Honors in the case of Looney v. Crane Co., supra, where, with reference to the limitation on the amount of the tax (by reason of which the tax was sustained in the Baltic Mining Company case) it was said:

> "In the second place, in making the inquiry stated in all of the cases, the compatibility of the statutes with the Constitution, which was found to exist, resulted from particular provisions contained in each of them, which so qualified and restricted their operation, and necessarily their effect, as to lead to such result: A. These conditions related to the subject matter upon which the tax was levied, or to the amount of taxes in other respects paid by the corporation, or limitations on the amount of the tax authorized when a much larger amount would have been due upon the basis upon which the tax was apparently levied."
>
> Looney v. Crane Co., 245 U. S. 178 (Op. 190).

The Illinois statute therefore does not possess the saving quality of the Massachusetts statute involved in the Baltic Mining Co. case or the Virginia statute involved in the General Railway Signal Co. case. It acts directly opposite to the Massachusetts statute. The Massachusetts statute decreases or limits "the amount of the tax authorized, when a much larger amount would have been due upon the basis upon which the tax was apparently levied," viz., 1/50 of 1 per cent of the corporation's capital (if 1/50 of 1 per cent amounted to more than $2,000.00, the tax was nevertheless limited to that sum). The Illinois

statute increases "the amount of the tax * * * which would have been due upon the basis upon which the tax was apparently levied," viz., 1/20 of 1 per cent of that portion of the corporation's stock represented by its property and business in Illinois. If 1/20 of 1 per cent did not amount to the minimum fixed by section 107, the amount of the tax was raised to that minimum.

The case of Cheney Bros. v. Massachusetts, 246 U. S. 147, involved the same statute and the same principles as the Baltic case.

The cases of Kansas City, Ft. S. & M. Ry. Co. v. Kansas, 240 U. S. 227; K. City, M. & B. R. R. v. Stiles, 242 U. S. 111; Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50, are clearly distinguishable on the grounds that the complaining corporations were **domestic corporations** which received from the taxing states the right (among others) to be a corporation.

> "Examining the statute in the present case, we see no reason to doubt the accuracy of the description of the tax by the state court. We take it to be simply a tax on the privilege of being a corporation—on the primary corporate franchise granted by the state. The authority of the state to tax this privilege, or franchise, has always been recognized, and it is well settled that a tax of this sort is not necessarily rendered invalid because it is measured by capital stock which in part may represent property not subject to the state's taxing power."
>
> Kansas City, Ft. S. & M. Ry. v. Botkin (Kansas), 240 U. S. 230 (Op. 232).

"The tax is not of the character condemned in Western Union Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. Ed. 355, 30 Sup. Ct. Rep. 190, and kindred cases. In the latter case a tax of large amount was imposed upon a foreign corporation engaged in interstate commerce for the privilege of doing local business within the state. Under the circumstances therein disclosed and the character of the business involved, this Court held that the statute was, in substance, an attempt to tax the right to do interstate business, and to tax property beyond the confines of the state, and was therefore void. Here a franchise tax is levied upon a corporation consolidated under the laws of the state by its own acceptance of that law in incorporating under it."

Kansas City, M. & B. R. Co. v. Stiles, 242 U. S. 111 (Op. 118).

The case of Hump Hairpin Mfg. Co. v. Emmerson, 258 U. S. 290, involved only the question of the manner of computing the proportion of the foreign corporation's stock represented by property and business in Illinois; the Court holding that the aggregate amount of interstate sales effected from the company's place of business in Illinois was properly included as business done in Illinois; such inclusion affecting interstate commerce only incidentally and indirectly; saying:

"Taxes have been so repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements in the process of determining the amount of a fund (not wholly derived from such commerce) to be assessed" (Op. 294).

In that case the Illinois statute was not attacked on the same grounds as was the Ohio statute in the case of Air-Way Elec. Co. v. Day, viz., that a tax on part of the corporation's unissued stock acted to deprive it of the equal protection of the law, etc. If the question had been raised, then, in view of the subsequent action of the Court in the Air-Way case, a different result would have been reached. The Supreme Court of Illinois, after sustaining this statute in

American Can Co. v. Emmerson, 288 Ill. 297;
Hump Hairpin Co. v. Emmerson, 293 Ill. 389;
Armstrong v. Emmerson, 300 Ill. 54,

later, when the equal-protection-of-the-laws objection was called to its attention, held the statute to be invalid.

O'Gara Coal Co. v. Emmerson, supra.

This most aptly illustrates appellant's error in calling attention to a certain statute and then stating that the Court sustained the statute without setting forth the specific questions raised and considered by the Court.

The case of Hump Hairpin Co. v. Emmerson is similar on principle to three other cases cited by appellant, namely:

Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113;
U. S. Glue Co. v. Oak Creek, 247 U. S. 321;
Peck v. Lowe, 247 U. S. 165,

which hold only that an income tax levied on the net income of a foreign corporation earned within the state (a part being earnings on interstate commerce), is not a direct or (in those cases) an unreasonable burden on interstate commerce. An income tax on the gross income earned by such corporation in interstate commerce would be a direct burden, and hence void.

In Postal Tel. Co. v. Adams, 155 U. S. 688, cited by appellant, this Court held that, in lieu of property taxes on telegraph lines, a state could exact the equivalent thereof in the form of a franchise tax.

In the case of Cudahy Packing Co. v. Hinkle, 278 U. S. 460, this Court considered and held violative of the commerce and due-process clauses, a statute of the State of Washington, which exacted of foreign corporations, admitted to that state, an annual franchise tax based on a scale of minimum amounts graduated and limited, as was the scale of the Virginia statute considered in the General Railway Company case.

VII.

The United States Circuit Court of Appeals Did Not Misconceive the Nature and Effect of the Tax.

On page 21 of his brief, appellant quotes an excerpt from the opinion of the Circuit Court of Appeals in this case. This excerpt was contained in the opinion before rehearing; after rehearing, the following was substituted:

"In short, it offered to pay 5 cents on each $100.00 of that part of its capital stock which was ascertained by applying said section 105."

See the opinion as published in 30 Fed. Rep. (2d Series) 322, at 323.

That the Court correctly understood the nature and effect of the tax, is clearly indicated by the whole of the opinion.

Furthermore, the **Judgment**, not the reasoning of the Court, is the matter here for review.

VIII.

For the foregoing reasons, appellee respectfully insists that the judgment of the Circuit Court of Appeals for the Seventh Circuit, reversing the judgment of the United States District Court for the Southern District of Illinois, should be affirmed.

Respectfully submitted,

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APPENDIX A.

All references are to

Chapter 32, Cahill's Revised Statutes 1927;
Chapter 32, Smith-Hurd Revised Statutes 1927.
Section numbers are identical in both volumes.

Sec. 80. **Certificate of Authority to Do Business—Requirement as to Payment of Capital Stock.**—Each foreign corporation organized for pecuniary profit (except banking, insurance, building and loan and surety companies), not now licensed to do business in this state, shall, before it transacts any business or maintains an office in this state, procure a certificate of authority therefor from the Secretary of State. No certificate shall issue to any foreign corporation authorizing it to transact business in this state until the same amount is paid on each share of stock issued or to be issued as is required of like corporations organized under the laws of this state.

As amended by L. 1927, p. 354, approved and in force May 12.

Sec. 81. **——Filing Application With Secretary of State—Contents.**—A foreign corporation desiring a certificate of authority hereunder shall file in the office of the Secretary of State:

(1) A copy of its charter duly authenticated by the proper officer of the state or country where it is incorporated;

(2) A statement verified by its president and secretary or other officer setting forth:

(a) The name of such corporation and the location of its principal office or place of business without this state,

and the location of the proposed principal office or place of business in this state;

(b) The names of the states in which it has qualified to do business under the corporation laws thereof;

(c) The character of business which it intends to carry on in this state;

(d) An itemized estimate of the amount of tangible property to be employed by it in the state during the first year next after the date on which it shall be licensed and begin to do business in this state;

(e) An estimate of the total amount of the capital to be employed by it in this state and an estimate of the total amount of capital to be employed by it elsewhere during such year, itemized as follows:

(1) The value of patent rights, licenses, franchises, trade-marks, secret processes, copyrights and good will.....$.....

(2) Contracts or choses in action.....$.....

(3) Merchandise, raw materials and goods in process of manufacture.....$.....

(4) Book accounts and notes.....$.....

(5) Machinery and real estate.....$.....

(6) Stock in other corporations and securities .....$.....

(7) Furniture, fixtures, stationery and like articles .....$.....

(8) Cash in bank.....$.....

(9) Kinds and amount of other personality (personalty) .....$.....

(f) An estimate of the annual business to be transacted by the corporation everywhere.

(g) An estimate of the annual business to be transacted at or from places of business in Illinois;

(h) The name and address of some person permanently residing in this state, upon whom, as the resident agent of the corporation until his successor shall have been appointed, service of legal process may be had, and the names and addresses of the officers and directors;

(i) Such other information touching the property and business of the corporation as the Secretary of State may require;

In the case of telegraph, telephone, cable, railroad or pipe line corporations, in addition to the itemized estimate of the total amount of capital to be employed in this state, there shall be given the total length of such telephone, telegraph, cable, railroad or pipe line, and the length of the line located in this state and the total value of such line and the value of such line in this state.

Sec. 92. **Revocation of Certificate of Authority to Do Business—Grounds.**—The certificate of authority of a foreign corporation, subject to the provisions of this act, may be revoked by the Secretary of State:

(1) Upon failure of an officer, director or manager, to whom interrogatories are propounded, to answer the same fully and to file such answer in the office of the Secretary of State within thirty days after the mailing of the same;

(2) If such corporation is transacting no business in Illinois and has no tangible property in this state;

(3) If the answer to interrogatories propounded by the Secretary of State discloses, or if the fact is otherwise ascertained, that the proportion of the capital stock of such corporation represented in this state is greater than the amount theretofore paid upon by such corporation and the deficiency in such fees is not paid within thirty days of the receipt of a notice sent by mail to the president and secretary, or to the statutory agent of such corporation of record in this state, or to the attorney filing the interrogatories for such corporation, or is not paid within such extension of time as may be granted by the Secretary of State;

(4) Upon failure of such corporation to keep on file in the office of the Secretary of State duly authenticated copies of each instrument amending its charter;

(5) Upon failure of such foreign corporation to appoint and maintain an agent in this state upon whom service of legal process may be had;

(6) Upon failure, neglect or refusal to file an annual report as required by this act, or upon failure, neglect or refusal to pay the franchise tax assessed against it on or before the thirty-first day of July of the year in which such franchise tax becomes due and payable;

(7) Upon failure, neglect or refusal to file a certificate of issuance of stock and the payment of the fees required by this act.

As amended by L. 1927, p. 354, approved and in force May 12.

Sec. 94. **Unlicensed Foreign Corporation Doing Business in State—Actions and Suits by—Penalties—Recovery.**—No foreign corporation doing business in this state without a

license shall be permitted to maintain any suit at law or in equity in any of the courts of this state upon any demand, whether arising out of contract or tort; and all such corporations shall be liable by reason thereof to a penalty therefor of not less than two hundred and fifty dollars nor more than one thousand dollars, to be recovered in any court of competent jurisdiction, in a civil action to be begun and prosecuted by the Attorney-General.

Sec. 96. **Incorporation Fee—Increase of Capital—No-par-value Stock, Basis of Fee—Public Utility Corporations.**—The Secretary of State shall charge and collect an initial fee of one-twentieth of one percentum upon the amount of the capital stock which the corporation, has issued or it proposes to issue at once, but in no case shall such fee be less than twenty dollars, and a like fee of one-twentieth of one percentum upon filing a certificate of any subsequent issue or increase of capital stock and in addition thereto the same fee as that required for filing other certificates of amendment. In the event that the corporation has capital stock of no-par value, its shares, for the purpose of fixing the fee, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares. Each public utility corporation, including railroads, shall pay to the Secretary of State the same fees as are required to be paid for incorporation by other corporations organized for pecuniary profit.

As amended by L. 1927, p. 354, approved and in force May 12.

Section invalid as against foreign corporations, prior to amendment (O'Gara Coal Co. v. Emmerson, 326—18).

Sec. 101. **Foreign Corporations—Fees for Certificate of Authority—On Increase of Stock—On Extensions, Consolidations, Mergers, Amendments—Basis of Fees—Where Capital Stock Without Par Value.**—Each foreign corporation for pecuniary profit, other than an insurance company or building and loan company, in addition to the annual franchise fees and taxes hereinafter provided, shall pay to the Secretary of State for its certificate of authority to do business in Illinois the same fees provided by this act to be paid by a similar corporation incorporated under the laws of this state. Each foreign corporation heretofore or hereafter admitted to do business in this state, shall also pay for increases in the amount of capital stock represented in Illinois, for extensions of existence, consolidations, mergers and for filing amendments the same fees required to be paid by corporations organized under the laws of this state. All such fees shall be based upon the proportion of its issued capital stock represented by business transacted and property located in Illinois. Whenever it shall appear that the amount of capital stock represented in Illinois is greater than the amount theretofore paid upon by any foreign corporation, such corporation, before it shall continue to transact business in Illinois, shall pay to the Secretary of State upon such excess the same fees that a domestic corporation must pay upon an increase in capital stock equal to the amount of such excess.

If a foreign corporation has a capital stock of no-par value, its shares, for the purpose of estimating the amount of fees and taxes to be paid hereunder, shall be taken and considered at the amount of the consideration re-

ceived or to be received by such corporation for such shares.

As amended by L. 1927, p. 354, approved and in force May 12;
Invalid prior to amendment (O'Gara Coal Co. v. Emmerson, 326—18;
Validity of earlier act. (See American Can Co. v. Emmerson, 288—289.)

Sec. 102. **Annual Reports—What Corporations Required to Make—Time for Making—Contents—Verification—Publication of List of Reporting Corporations—Copy to Recorder of Deeds.**—Each corporation, including railroads, domestic and foreign, other than homestead associations, building and loan association[s], banks, religious corporations, insurance companies, and corporations not for pecuniary profit, shall make a report in writing to the Secretary of State between the first day of February and the first day of March of each year on forms to be prescribed and furnished by the Secretary of State. That part of the annual report relating to property and business shall be made as for the calendar year ending December thirty-first preceding (except in case the corporation keeps its accounts on the basis of a fiscal year not identically with the calendar year it shall make report for the fiscal year next preceding February first of the year in which such report is made. The other information required in such report shall be given as of the date of execution of such report. In case the corporation has not been in existence a year it shall furnish the Secretary of State the information required for the period since it was incorporated or admitted. Such report shall give the address of the corporation, officers and directors in this state by street and number. Such annual report shall also dis-

close such facts as are necessary to enable the Secretary of State to ascertain the proportion of its capital stock represented by business transacted and tangible property located in this state, and such other information as may be necessary or appropriate in order to assess the annual license fee or franchise tax. Such report shall be verified by the oath of the president, vice-president, secretary, assistant secretary or treasurer of the corporation, but in case the corporation is in the hands of an assignee, receiver or trustee then such report shall be signed and verified by such assignee, receiver or trustee.

The Secretary of State shall on or before the 15th day of January of each year forward to each corporation of record in his office a copy of the forms to be used in making the report specified in this act, but the failure to send or to receive such forms shall not relieve the corporation from the duty of making such report.

The Secretary of State shall publish on or before September first of each year a list of corporations filing an annual report in accordance with the provisions of this act, with the names and addresses of the president and secretary of domestic corporations or the agent for service of legal process of foreign corporations, and shall furnish a copy thereof to each Recorder of Deeds.

As amended by L. 1921, p. 365, June 11, July 1.

Sec. 105. **Annual License Fee or Franchise Tax—Amount—Minimum—No-par-value Stock.**—Each corporation for profit, including railroads, except insurance companies, heretofore or hereafter organized under the laws of this state or admitted to do business in this state, and required by the act to make an annual report, shall pay an annual license fee or franchise tax to the Secretary of State of

five cents on each one hundred dollars of the proportion of its issued capital stock, or amount to be issued at once, represented by business transacted and property located in this state, but in no event shall the amount of such license fee or franchise tax be less than that required by this act of corporations having no property or business in this state.

In the event that the corporation has stock of no-par value, its shares, for the purpose of fixing such fee, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares.

As amended by L. 1921, p. 365, June 11, July 1; L. 1923, p. 280, May 3; L. 1927, p. 354, approved and in force May 12.

The 1927 amendment carried an emergency clause, as follows:

Sec. 2. Whereas, the Supreme Court of this state has held that certain sections of the General Corporation Act, which based the fees on the authorized capital stock, are unconstitutional as to foreign corporations;

Whereas, under the decision of the Supreme Court the Secretary of State will not be able to collect the fees from corporations to which the state is entitled and further, that all of the annual franchise tax provisions of said act are in danger of being invalidated unless said sections are amended, and,

Whereas, the Secretary of State is, under the provisions of section 112 of the aforesaid act, obliged to mail notice between the first day of February and the fifteenth day of May, in writing, to each corporation against which a franchise tax or fee is assessed, notifying such corporation of the amount of franchise tax or fee assessed against it for the year next ensuing, commencing on July first, and,

Whereas, unless this act becomes effective on or before May fifteenth the state will lose the fees from corporations to which the state is justly entitled;

Therefore, an emergency exists and this act shall take effect and be in full force from and after its passage.

Following is the emergency clause of the 1923 amendment:

Sec. 2. Whereas, at time of passage of the present "The General Corporation Act" of this state conferring upon corporations the privilege of having shares without a par value, it was the intent of the Legislature at that time as a prerequisite to the right of the corporations to enjoy such privilege that in all cases and under all circumstances that such corporations should pay for such privilege the same amount of initial fee and franchise taxes or fees as though such shares were of the par value of one hundred dollars ($100) per share; and

Whereas, it was thought that the Legislature had made this intent perfectly clear in the original act as passed; and

Whereas, the Supreme Court of this state has held that the Secretary of State cannot regard the shares of no-par value for the purpose of assessing the franchise taxes or fees as of the par value of one hundred dollars ($100) per share and require the corporation to pay a franchise tax of five cents (5c) on each share of no-par value since the following words were omitted from section 105 of the aforesaid act, to wit:

"In the event that the corporation has stock of no-par value, its shares, for the purpose of fixing such fee, shall be considered to be of the par value of $100 per share," and

Whereas, Under the decision of the Supreme Court, the Secretary of State will not be able to collect large sums of money from corporations to which the state is justly entitled, and further that all of the annual

franchise tax provisions of the aforesaid act are in danger of being invalidated unless this omission is remedied; and

Whereas, The Secretary of State is, under the provisions of section 112 of the aforesaid act, obliged to mail notice between the first day of February and the fifteenth day of May, in writing to each corporation against which a franchise tax or fee is assessed, notifying such corporation of the amount of franchise tax or fee assessed against it for the year next ensuing, commencing on July first; and

Whereas, That unless this act becomes effective on or before May 15, that the state will lose large sums of money due from corporations and to which the state is justly entitled, therefore, an emergency exists and this act shall take effect and be in full force from and after its passage.

This section was also amended in identical terms by L. 1923, p. 281, approved April 12, but probably owing to the invalidity of the emergency clause in the amendment of April 12, 1923, it was expressly repealed by the act of May 3,1923, amending the section.

Section does not deny due process nor impair obligation of contracts (Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50, 46 S. Ct. 375; see, also, Roberts & Schaefer Co. v. Emmerson, 313—137).

Section invalid as to foreign corporations (O'Gara Coal Co. v. Emmerson, 326—18).

Sec. 106. **Ascertainment of License Fee or Franchise Tax in Case of Corporations Generally.**—In ascertaining the amount of the issued capital stock represented by business transacted and property located in this state, the sum of the business of any foreign or domestic corporation transacted in this state and the total property of such corpora-

tion located within this state shall be divided by the sum of the total business of the corporation, and the total property of the corporation wherever situated.

As amended by L. 1927, p. 354, approved and in force May 12.

Sec. 107. ——**Basis in Case of Corporation Without Property in State and Doing No Business in State—Where Stock of No-par Value.**—In case it appears from the annual report that the corporation has no property located in this state, and is transacting no business in this state, the following fees shall be paid annually to the Secretary of State as an annual franchise tax: All such corporations having issued capital stock of $50,000 or less shall pay an annual fee of $10; corporations having issued capital stock of more than $50,000, but not exceeding $200,000, shall pay an annual fee of $15; corporations having issued capital stock of more than $200,000, but not exceeding $500,000, shall pay an annual fee of $20; corporations having issued capital stock of more than $500,000, but not exceeding $1,000,000, shall pay a fee of $50; corporations having issued capital stock of more than $1,000,000, but not exceeding $10,000,000, shall pay a fee of $200; corporations having issued capital stock of more than $10,000,000, but not exceeding $20,000,000, shall pay a fee of $500; and all corporations having issued capital stock in excess of $20,000,000 shall pay an annual fee of $1,000.

In the event that the corporation has stock of no-par value, its shares, for the purpose of fixing such fee, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares.

As amended by L. 1927, p. 354, approved and in force May 12.

Sec. 108. When Franchise Tax Payable.—The franchise tax herein provided to be paid shall be due and payable on the first day of July of each year and shall be the franchise tax for the year commencing on the first day of July in which it is due and ending on the thirtieth day of June next thereafter.

Sec. 109. **Assessment of Tax From Annual Report—Corporations Organized Between January 15 and March 1.**—The Secretary of State shall, from the annual report filed, assess a tax at the rates herein prescribed against each corporation required herein to make an annual report.

The Secretary of State shall from the best available information also assess such tax on all corporations organized or admitted between the fifteenth day of January and the first day of March.

As amended by L. 1921, p. 365, June 11, July 1.

Sec. 112. **Notice of Amount of Franchise Tax—Contents —Failure to Receive.**—Between the first day of February and the fifteenth day of June, of each year, the Secretary of State shall mail a notice in writing to each corporation against which a tax is assessed, notifying such corporation of the amount of the franchise tax assessed against it for the year next ensuing, commencing on July first, and the amount found by the Secretary of State to be due upon an increase of capital stock of a foreign corporation represented in this state, and that objections, if any, to such assessment will be heard by the officer making such assessments, upon request by corporation on a day not later than the twenty-fifth day of June provided upon proper showing to the Secretary of State that the failure to request a hearing before that date was due to

the absence or sickness on the part of some officer of the corporation, the Secretary of State may grant a hearing after that date. Such notice shall further state that the tax herein assessed is payable to the officer making the assessment on July first after the date of the notice. The notice required by this section shall be mailed to the corporation addressed to its post-office address, as shown by the records in the office of the Secretary of State. A failure to receive the notice mentioned in this section shall not relieve a corporation of the obligation to pay the annual franchise taxes nor shall it invalidate the assessment of the tax.

As amended by L. 1921, p. 365, June 11, July 1; L. 1927, p. 354, approved and in force May 12.

Sec. 113. **Collection of Assessment.**—It shall be the duty of the officer making the assesment to collect the same.

Sec. 114. **Delinquent Corporations—Penalty.**—If the franchise tax assessed in accordance with the provisions of this act shall not be paid on or before the thirty-first day of July, it shall be deemed to be delinquent, and there shall be added a penalty of five per cent for each month or part of month that the same is delinquent, commencing with the month of August.

Sec. 115. **Franchise Taxes and Penalties a Prior Lien—Record of Taxes, Penalties and Costs.**—The franchise taxes assessed under this act, together with penalties, interest and costs that shall accrue thereon, shall be a prior and first lien on the real and personal property of the corporation from and including the first day of July of the year when such franchise taxes should have been paid until the same have been paid.

The Secretary of State shall make and keep in his office a record showing the name of each corporation against which a franchise tax has been assessed, the amount assessed against each corporation, together with penalties and costs, if any, and the date when paid, and a notation of any and all proceedings taken for the collection of the franchise tax.

Sec. 116. **Collection of Delinquent Franchise Taxes and Penalties—Procedure.**—In case any corporation shall fail, refuse or neglect to pay the franchise tax assessed against it on or before the thirty-first day of July, the Secretary of State shall issue a warrant, under his hand and official seal, directed to the Sheriff of any county in the state, commanding him to collect and return such franchise tax and penalties. It shall be the duty of the Sheriff receiving such warrant to levy upon and sell the personal property of such corporation to satisfy such franchise tax and penalties, together with the legal costs and charges of such Sheriff. Upon the receipt of such warrant the Sheriff shall proceed upon the same in all respects, with like effect, and in the same manner as prescribed by law in respect to executions issued against property upon judgments of courts of record, and shall be entitled to the same fees for the execution of the warrant, to be collected in the same manner. After proceeding in the manner prescribed, the Sheriff shall make the proper and necessary notations, of the amounts collected, upon the warrant and promptly return it to the Secretary of State within ninety days from the date of issuance thereof, with the amount of franchise tax and penalties collected by him, if any.

As amended by L. 1921, p. 365, June 11, July 1.

Sec. 128. **Payment of Franchise Tax and Fees as Condition to Doing Business or Maintaining Suits.**—No corporation required to pay a franchise tax or fee under the laws of this state shall transact any business in this state or maintain any action at law or suit in equity, unless such corporation shall have paid such franchise tax, or such fees and penalties when the same become due and payable until such franchise taxes, fees and penalties have been paid in full.

As amenedd by L. 1921, p. 365, June 11, July 1.

Sec. 129. **Annual Franchise Taxes.**—In addition to all other fees required by law to be paid, the Secretary of State shall collect in advance from corporations subject to a franchise tax, annual franchise taxes as follows:

(1) If a corporation is organized, or admitted to do business in this state, or its capital stock issued or increased;

(a) Between July first of any year (after the year 1919), and September thirtieth of the same year a franchise tax equal to the full amount of the annual franchise tax;

(b) Between October first of any year (after the year 1919) and December thirty-first of the same year a franchise tax equal to three-fourths of the annual franchise tax;

(c) Between January first of any year and the last day of February of the same year, a franchise tax equal to one-half of the annual franchise tax;

(d) Between March first of any year and June thirtieth of the same year, a franchise tax equal to one and one-third of the annual franchise tax.

The franchise tax required by paragraphs "a," "b" and "c" shall be for authority of the corporation to carry

on its corporate business until the thirtieth day of June following the date of payment of such tax. The franchise tax required by paragraph "d" of existing corporations increasing their capital stock shall be for authority of the corporation to employ its increased capitalization in this state until the thirtieth day of the second June following, but such corporation shall still be liable to pay its annual franchise tax upon its old capital stock in July following in the same manner as required of other corporations not increasing their capital stock. The fees required in this section shall be based upon the percentum of issued capital stock as evidenced by latest annual report required to be filed under the provisions of this act, if any.

The word "between," as used in this section, shall include both dates specified.

As amended by L. 1921, p. 365, June 11, July 1; L. 1927, p. 354, approved and in force May 12.

Sec. 130. ——**In Addition to Other Licenses or Taxes.** —The annual franchise taxes imposed by this act shall be in addition to any specific licenses or taxes imposed by law upon such corporation for the privilege of carrying on its business, or upon its franchise or property.

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No. 6.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1930.

WILLIAM J. STRATTON, Secretary of the State of Illinois,
Appellant,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
a Corporation,
Appellee.

Appeal from the United States Circuit Court of Appeals
for the Seventh Circuit.

STATEMENT, BRIEF AND ARGUMENT FOR APPELLEE.

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No. 6.

IN THE

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WILLIAM J. STRATTON, Secretary of the State of Illinois,
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a Corporation,
Appellee.

Appeal from the United States Circuit Court of Appeals
for the Seventh Circuit.

STATEMENT, BRIEF AND ARGUMENT FOR APPELLEE.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

Appellant correctly states the facts, but, in order that the inapplicability of the authorities relied on by appellant may be made more apparent, a more detailed explanation of the pertinent provisions of the Illinois Corporation Act (which are set out in full in the Appendix, infra, page 45) is necessary.

All references to the sections of the statute are to Chapter 32, Cahill's Revised Statutes Illinois 1927, and Chapter 32 of Smith-Hurd's Revised Statutes Illinois 1927. The sections have the same numbers in each statute.

The State of Illinois exacts, and, at the time this controversy arose, exacted, from domestic corporations (Sec. 96) an "initial" (incorporation) fee, but once paid on its stock as issued, and also an "annual license fee or **franchise tax**" for the remainder of the first year (Sec. 129) and yearly thereafter (Secs. 105-107).

Section 80 provides that every foreign corporation shall, "before it transacts any business or maintains an office in this state, procure a certificate of authority therefor from the Secretary of State."

Section 81 provides the form of such application in the manner of a questionnaire covering information from which the Secretary of State may compute the proportion of its capital stock which will be represented in Illinois during the remainder of the first calendar year of its admission by the corporation's estimate of its business to be done within and property to be brought into the state during that period, and by a like estimate of its business and property in other states during the same period.

Section 101 provides for an admission tax (the complement of the "initial" or incorporation fee charged domestic corporations by section 96), requiring a foreign corporation to pay for a "certificate of authority to do business in Illinois, the same fees provided by this to be paid

by a similar corporation incorporated under the laws of this state. * * * All such fees shall be based upon the proportion of its issued capital stock represented by business transacted and property located in Illinois."

In addition to the admission tax of the foreign corporation, an "annual license fee or franchise tax" is exacted of it, covering the remainder of the first year of its admission (Sec. 129), and annually thereafter (Secs. 105-107), based on the proportion of its issued capital stock represented in Illinois, as determined by the estimate stated in the application, pursuant to section 81.

It is the "annual license fee or franchise tax" for the year July 1, 1927-June 30, 1928, which is involved in this appeal. Appellee having prior thereto been admitted into Illinois on the payment of the requisite initial or admission fee.

Having admitted a foreign corporation, as a quasi citizen, into the state, the State of Illinois requires both foreign and domestic to file an annual report, section 102 providing that

> "Each corporation, including railroads, domestic and foreign, * * * shall make a report in writing to the Secretary of State between the 1st day of February and the 1st day of March of each year on the forms to be prescribed and furnished by the Secretary of State. That part of the annual report relating to property and business shall be made as for the calendar year ending December 31st preceding. * * *

> Such annual report shall also disclose such facts as are necessary to enable the Secretary of State to ascertain the proportion of its capital stock represented by business transacted and tangible property located in this state and such other information as may be necessary or appropriate in order to assess the annual license fee or franchise tax."

On the basis of the annual reports (Sec. 109) filed by foreign and domestic corporations the Secretary of State of Illinois is required to determine the proportion of the capital stock represented by business transacted and property located in the state.

Section 106 provides that, "In ascertaining the amount of the issued capital stock represented by business transacted and property located in this state, the sum of the business of any foreign or domestic corporation transacted in this state and the total property of such corporation located within this state shall be divided by the sum of the total business of the corporation and the total property of the corporation wherever situated."

Having determined the amount of capital stock of each foreign and domestic corporation—so represented in Illinois—the Secretary of State computes their annual franchise taxes as is provided by paragraphs 105 and 107 of the statute and as set forth in appellant's brief.

It might be further noted that the bill avers and the statute provides that on the failure of a corporation to pay the annual franchise tax the Secretary of State could and

would forfeit the right of such corporation to do business in Illinois (Sec. 92). The statute provided for divers penalties, against the corporation and its officers, account their failure to comply with the statute (Sec. 114) (Rec., p. 5).

The annual report on which the tax in question was based was filed, as required by the statute (Sec. 102), in February, 1927, and covered property owned and business done in the state during the calendar year of 1926.

The statute (Sec. 112) provided that between the 1st day of February and 15th day of June the Secretary of State should mail a notice to each corporation, notifying it of the amount assessed against it for the ensuing year; and in this case for the year beginning July 1, 1927, and ending June 30, 1928.

The statute under which this cause arises was amended by act approved May 12, 1927, and effective that date, an emergency having been declared (Rec., p. 25) (Illinois Laws 1917, pages 359-360) because the prior statute had been declared unconstitutional.

> See O'Gara Coal Co. (Beatrice Creamery Co., No. 18,177) v. Emmerson, 326 Ill. 18, at 44.

Appellee contended in the District Court (Rec., p. 30), in the Circuit Court of Appeals (Rec., p. 40) and here contends, that, as applied to it, under the facts pleaded, paragraphs 105 and/or 107 of the Illinois Corporation Act are

void, in that they take from appellee rights guaranteed to it by the Constitution of the United States:

1. Unreasonably burdening and directly taxing appellee's commerce between the states, in violation of Section 10 of Article I of the Constitution of the United States.

2. Taxing appellee's property and business outside the State of Illinois, and thereby depriving appellee of its property without due process, contrary to the Fourteenth Amendment to the Constitution of the United States.

3. Charging appellee more than was charged other corporations for the same privileges and discriminating against appellee in favor of **other foreign and domestic** corporations, thereby denying it the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

BRIEF.

I.

As to appellant, the tax of one thousand ($1,000.00) dollars resulting from the application under the proviso of section 105 of the scale of minimum amounts of tax provided by Section 107 of the General Corporation Act is void, being a direct, as well as an unreasonable, burden on the interstate commerce engaged in by appellee, in that the annual franchise tax exacted of appellee on that portion of its issued capital represented in Illinois, and amounting to $135.21, is the maximum which can be exacted of it on that part of its capital stock so represented in Illinois, and when the appellant assessed an additional tax of $864.79 such additional amount necessarily fell partly on the interstate business conducted by appellee and amounted to a direct tax and an unreasonable burden on appellee's commerce between the states.

Western Union Tel. Co. v. Kansas, 216 U. S. 1;
Ludwig v. Western Union Tel. Co., 216 U. S. 146;
Looney v. Crane Co., 245 U. S. 178;
International Paper Co. v. Mass., 246 U. S. 135;
Air-Way Electric Co. v. Day, 266 U. S. 71;
Gudahy Packing Co. v. Hinkle, 278 U. S. 460.

II.

Appellee is likewise deprived of its property without due process of law, within the inhibition of the Four-

teenth Amendment, because, when computed on the basis of the portion of appellee's issued capital stock represented by property and business in Illinois, the franchise tax would amount of $135.21, and when appellant assessed a tax of $864.79 in addition thereto, such additional assessment fell on appellee's capital stock, which represented its property in other states, and amounted to an unlawful tax upon appellee's property in other states.

Western Union Tel. Co. v. Kansas, 216 U. S. 1;
Ludwig v. Western Union Tel. Co., 216 U. S. 146;
A. T. & S. F. Ry. Co. v. O'Connor, 223 U. S. 280;
Looney v. Crane Co., 245 U. S. 178;
Air-Way Elec. App. Corp. v. Day, 266 U. S. 71;
Cudahy Packing Co. v. Hinkle, 278 U. S. 460.

III.

After admitting a foreign corporation the state cannot impose an annual excise, where the sole business conducted by the corporation within the state is in interstate commerce.

Alpha Portland Cement Co. v. Mass., 268 U. S. 212, 218;
Ozach Pipe Line Corp. v. Monier, 266 U. S. 561, 565.

IV.

As applied to appellee, Paragraphs 105 to 107 of the Illinois Corporation Act deny it the equal protection of

the laws, discriminating against it and in favor of other domestic and foreign corporations having like business and assets in Illinois, but a smaller amount of issued capital stock.

A state, in levying excises on corporations, cannot consistently, with the equal-protection-of-the-laws clause, discriminate in any way:

(a) Between foreign corporations of the same class which it has admitted into the state.

Air-Way Electric Appliance Co. v. Day, 266 U. S. 71;
Hanover Ins. Co. v. Carr, supra, 272 U. S. 494, Op. 510;
O'Gara Coal Co. v. Emmerson, 326 Ill. 18, at 32.

(b) Discriminate in any way against such foreign and in favor of domestic corporations.

Southern Ry. Co. v. Greene, 216 U. S. 400, 418.

(c) Nor discriminate between domestic corporations.
Royster Guano Co. v. Virginia, 253 U. S. 412.

As applied to appellee, the statute violates the equal protection clause, because the tax is not limited to that part of appellee's capital stock justly apportionable to the State of Illinois.

International Shoe Co. v. Shartel, 279 U. S. 429, 434.

A franchise tax against a foreign corporation and method of fixing the same must bear a reasonable relation to the value of the privilege granted.

Air-Way Elec. v. Day, supra.

Although having power to exclude foreign corporations, a state cannot limit entry on condition that such corporations waive any of their constitutional rights.

Looney v. Crane, 245 U. S. 178, Op. 187-8;
Western Union v. Kansas, 216 U. S. 1, Op. 47-8;
Pullman Co. v. Kansas, 216 U. S. 56, Op. 63-4;
Hanover Fire Ins. Co. v. Carr, 272 U. S. 494, Op. 507;
Frost v. R. R. Comm., 271 U. S. 591, at 593-4, 599.

The franchise tax involved in this appeal is also much different than an incorporation fee exacted of a domestic corporation or its complement, an admission or "initial" fee exacted by the state from foreign corporations seeking admittance (there being but one collection of the tax), as to which different rules apply.

Hanover Ins. Co. v. Harding, 272 U. S. 494;
Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50;
People of State of New York v. Latrobe, 279 U. S. 421.

Authorities cited by appellant, which are distinguishable on the foregoing grounds, are:

General Ry. Signal Co. v. Va., 246 U. S. 500;

K. C., Ft. Scott & M. R. R. v. Kansas ex rel. Botkin, 240 U. S. 227;
K. C. M. & B. R. R. v. Stiles, 242 U. S. 111;
Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50.

Appellant's authority to issue stock or the number of shares it may have issued and outstanding does not depend upon the laws of Illinois. Its sole authority in that respect depends upon the laws of Missouri under which it was created.

Air-Way Electric Appliance Co. v. Day, 266 U. S. 71;
Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50;
O'Gara Coal Co. v. Emmerson, 326 Ill. 18, at 32.

The Illinois Statutes prohibit appellee from acquiring other railroad properties without first securing a certificate of convenience and necessity from the Illinois Commerce Commission.

Smith-Hurd Statutes 1927, Chap. 111 2/3, Par. 56;
Cahill's Ill. Rev. Statutes 1927, Chap. 111a, Par. 71.

Under which statute, as construed by the Illinois courts, no certificate of convenience and necessity can be granted to an applicant as long as any other utility in the field is rendering adequate service.

Egyptian Transportation System v. Louisville & Nashville R. R., 321 Ill. 580;
Illinois Power & Light Corp. v. Illinois Commerce Commission, 320 Ill. 427.

ARGUMENT.

I.

Nature of the Tax.

Appellant states (Brief, p. 7) that the excise required by Sections 105 and 107 of the Illinois Corporation Act is a tax "for the right or privilege granted of doing business in that state during the next year."

At the risk of being over technical, we differ. By the clear provision of Illinois act (Sections 80, 81, 101) appellee paid "for" the right or privilege of doing business in Illinois at the time of its admission and at the time it paid the admission fee, the complement of the "initial" fee exacted of domestic corporations at the time of their organization.

This case involves an excise—"an annual license fee or franchise tax." It is a tax **on** or on the exercise of the privilege already granted of exercising corporate functions in Illinois, otherwise it would not be an excise. It is not in form or substance a price demanded by or paid to the State of Illinois in return for the right to be a corporation in Illinois—such a charge is covered by sections 80, 81 and 101 of the statute. Sections 105 and 107 are revenue-producing measures—laying an excise tax upon the exercise by appellant of a contract right previously granted.

It is settled that the authority of a state with regard to the levy of excises on foreign corporations which it has

heretofore admitted, is different from its authority with regard to their admittance into the state.

On admission the state may charge what it pleases for the granting of the right, the franchise, to be a corporation in the state, so long as it does not attempt to require the waiver of any constitutional rights or discriminate between applicants.

But, once admitted, the state has no such broad power as regards the levying of excise taxes on the privileges granted by it.

> "In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether such a charge violates the equal-protection clause of the Fourteenth Amendment, a line has to be drawn between the burden imposed by the state for the license or privilege to do business in the state and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state. With respect to the admission fee, so to speak, which the foreign corporation must pay to become a quasi citizen of the state and entitled to equal privileges with citizens of the state, the measure of the burden is in the discretion of the state and any inequality, as between the foreign corporation and the domestic corporation in that regard, does not come within the inhibition of the Fourteenth Amendment, but, after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind."

Hanover v. Carr, 272 U. S. 494, Op. 510-511.

II.

The Questions Involved in This Case.

We say, therefore, the question is not (as stated by appellant, Brief, p. 12) whether

> "the State may require a corporation organized or admitted to do business in the state, to pay a minimum fee or franchise tax, as provided in sections 105 and 107, **for granting it the privilege of doing business** in the state during the next year, although it may not have actually exercised its franchise in the state the preceding year to a sufficient extent to produce such an amount of tax at the rate specified in section 105."

Actually, the questions involved in this case are:

1. May the gross amount of the issued capital stock of a foreign corporation, consistently with the commerce and due-process clause of the Constitution, be made the measure of an annual excise exacted by the state, of a foreign corporation, before that time admitted into the state, irrespective of the amount of the capital stock of such corporation actually represented in the state?

2. May a state, consistently with the equal-protection-of-the-laws clause of the Constitution, exact an annual excise from a foreign corporation which it had previously admitted, basing said tax as to one corporation on its total issued stock, irrespective of the amount of said stock represented in the state, and as to other corporations, both

foreign and domestic, based on the proportion of their stock represented by property and business in the state, and resulting in the one corporation paying a larger tax on each dollar of its capital stock represented in the state than is paid on each dollar of the capital stock (represented in the state) of such other corporations?

3. Does a state statute exacting an annual excise of foreign corporations, measured and graduated according to the gross amount of the issued capital stock of such corporation and without regard to the amount thereof represented in the taxing state, consistently with the equal-protection-of-the-laws clause, require like fees for equal privileges held by all foreign corporations under the same circumstances?

III.

As to Appellee the Tax of One Thousand ($1,000.00) Dollars Resulting from the Application, Under the Proviso of Section 105 of the Scale of Minimum Amounts Provided by Section 107 of the General Corporation Act, Is Void, Being a Direct, as Well as Unreasonable, Burden on the Interstate Commerce Engaged in by It.

By virtue of clause 3 of Section 8 of Article I of the Constitution of the United States, the State of Illinois is prohibited from laying any direct or unreasonable tax on interstate commerce.

The reasoning of the Court in the case of Western Union Tel. Co. v. Kansas, 216 U. S. 1, is most pertinent,

notwithstanding the fact that the case may be said to involve an admission tax rather than a franchise tax. Prior to 1898, apparently no admission or franchise taxes were exacted by the State of Kansas from foreign corporations. Prior to that time the Western Union Telegraph Company had entered the state and was doing a local business. Legislation requiring foreign corporations to pay a "charter fee" of 1/10 of 1 per cent of authorized capital, as a condition of continuing a local business, was enacted in 1898. The Western Union Company resisted and invoked the protection of the commerce and due-process clauses.

The Supreme Court reasoned that as the whole of the capital stock represented the whole of the corporation's business, and as only a part of the corporation's capital, property and business was in Kansas, the tax on all of its capital stock was, of necessity, a tax on all of its property and all of its business, which included its interstate business. Wherefore the tax was in part a direct burden, a direct tax, on the corporation's business in interstate commerce, and therefore void. It is only where the burden is indirect or incidental that the commerce clause would not be violated unless the burden be unreasonable.

Here, as in the Western Union Company case, the tax is a direct burden on the interstate commerce conducted by appellee, because one hundred thirty-five and 21/100 ($135.21) dollars is the tax which would be due from appellee on the proportion of its capital stock represented by property owned and business done in Illinois. The

balance of its capital stock is represented by property and business in other states. The appellee demands eight hundred sixty-four and 79/100 ($864.79) dollars additional. If paid, then, of necessity, it is a tax and a direct burden upon all of appellant's property and business, including appellant's interstate commerce, and it is therefore void.

In the case of Looney v. Crane Co., 245 U. S. 178, this Court considered a statute of the State of Texas which levied an annual excise on foreign corporations graduated according to their authorized capitals, without regard to the amount thereof actually in the state, and determined such statute to be invalid because such taxes were direct burdens on interstate commerce, and, moreover, exerted the taxing authority of the state over property and rights which were wholly beyond the confines of the state and not subject to its jurisdiction, and, therefore, constituted a taking without due process.

The case of Air-Way Electric Appliance Co. v. Day, 266 U. S. 71, involved franchise tax based on the portion of the authorized stock of a foreign corporation (only a part of which was issued) represented by property owned and business done in the taxing state. It was held that the tax based on the authorized but unissued stock, of necessity, fell, in part, on issued stock which represented commerce between the states carried on by the corporation.

> "As some of the outstanding shares are represented by plaintiff's interstate business, the application of

the rate to all the shares, or to a number greater than the total outstanding, necessarily amounts to a tax and direct burden upon all the property and business, including the interstate commerce, of the plaintiff (International Paper Co. v. Massachusetts, supra, 142). We hold that the act violates the commerce clause" (Op. pp. 82-83).

Air-Way Electric Appliance Corp. v. Day, Op. 268 U. S. 71.

The actual effect of sections 105-107 of the Illinois statute is the same as the actual effect of the Ohio statute. The body of section 105 fixes a tax on the basis of property owned and business done in Illinois. The proviso of section 105 singles out a class of corporations (including appellee) and places an additional burden and tax on them—the scale of minimums provided by section 107. This additional burden and tax must, in part, fall on and directly burden appellee's commerce between the states.

If the State of Illinois had levied a tax based on the authorized stock of appellee (a part of which is unissued), it would be void. If the tax was based on any part (but not all) of the authorized but unissued stock, we do not believe the Court would have any hesitancy in declaring it to be void. Here, the tax is based, first, upon appellee's issued stock represented in Illinois, and then an additional amount is arbitrarily added thereto. There is no difference, in substance, between the decided cases and this.

These cases involved no tax scale graduated by the corporation's stock, as does this case. Recently, however, in the case of Cudahy Packing Co. v. Hinkle, 278 U. S. 460, this Court considered a state statute exacting an annual excise from corporations graduated according to the amounts of their authorized capital stock and with a fixed maximum. The tax was held void because not limited to that portion of the corporation's capital stock represented within the taxing state, it necessarily fell in part on the corporation's interstate business and on its property in other states.

Appellant will attempt to distinguish the Cudahy case on the ground that the scale of taxes was based on "authorized" capital stock, while in this case the scale is based on "issued" capital stock and, therefore, fell within the rule of the Air-Way case. If we correctly interpret the Court's opinion, such element was unimportant and the result would have been the same, even though the tax scale had been based on the "issued" stock. This is indicated because of the fact that the scale was based on authorized rather than issued stock, was not discussed as having any bearing on the case and in the last paragraph of its opinion the Court said:

> "Whether, because reckoned **upon authorized and not upon actual capital stock**, the challenged legislation fails to require like fees for equal privileges within the doctrine of Air-Way Electric case, we need not now consider" (Op., p. 467).

We most earnestly urge this case clearly falls within the principles of the decided cases and as applied to appellee, the Illinois statutes here involved, directly as well as unreasonably burden interstate commerce and are void.

IV.

Appellee Is Likewise Deprived of Its Property Without Due Process of Law, Within the Inhibition of the Fourteenth Amendment.

It is the well-established rule that a state cannot, consistent with the due-process clause, levy a tax on property without its territorial limits.

The rule was first applied to a tax on the capital stock of a corporation in the case of Western Union Tel. Co. v. Kansas, 216 U. S. 1, where the Court held void a Kansas statute requiring foreign corporations, which had been doing business in Kansas, as a condition of continuing to do a local business, to pay a fixed (one-tenth of 1 per cent) per cent of their authorized capitals. Domestic corporations were required to pay the same fees. The statute was held to deprive the Western Union Telegraph Company of property without due process of law. The Court properly reasoned that the corporation's capital stock represented all of its property situated in other states, as well as in Kansas, and, hence, a tax based on all of the capital stock was a tax on all of its property located in all such states, violating the due-process clause.

So here, as the Illinois statute is applied to appellee, its property located without the State of Illinois is subjected to an Illinois tax. For appellee's tax, based on the proportion of its issued stock, represented by property and business in Illinois, would be one hundred thirty-five and 21/100 ($135.21) dollars. That sum would be the amount of tax on appellee's property and business in Illinois. The State of Illinois demands eight hundred sixty-four and 79/100 ($864.79) dollars more. Such additional exaction must necessarily fall on that portion of appellee's stock which represents its business and property, located elsewhere, and the tax is void under the due-process clause.

The theory of the case of Western Union Tel. Co. v. Kansas has been reaffirmed and applied in

Ludwig v. Western Union Tel. Co., 216 U. S. 146;
A. T. & S. F. Ry. v. O'Connor, 223 U. S. 280;
Looney v. Crane Co., 245 U. S. 178;
International Paper Co. v. Mass. 246 U. S. 135;
Air-Way Elec. App. Corp. v. Day, 266 U. S. 71;
Cudahy Packing Co. v. Hinkle, 278 U. S. 460.

V.

Sections 105-107 of the Illinois Corporation Act, on Their Face, as Well as in the Application, Act to Deprive Appellee of the Equal Protection of the Laws.

The Circuit Court of Appeals did not find it necessary, in its opinion, to discuss the third, and, we believe, the

strongest, ground upon which appellee assailed the Illinois statute.

That the effect of the Illinois statutes was to deprive appellee of the equal protection of the laws, was charged in the bill of complaint (Rec., p. 7); discussed in the opinion of the District Court (Rec., p. 34); and assigned by appellee was error in the Circuit Court of Appeals (Rec., p. 40).

As applied to annual franchise taxes, it has been specifically held that a state cannot consistently, with the equal-protection-of-the-laws clause, discriminate in any way.

(a) Between foreign corporations of the same class, which it has admitted into the state.

Air-Way Electric Appliance Co. v. Day, 266 U. S. 71;
Hanover Ins. Co. v. Carr, 272 U. S. 494, Op. 510;
O'Gara Coal Co. v. Emmerson, 326 Ill. 18, Op. 32.

(b) Discriminate, in any way, against such foreign, and in favor of domestic, corporations.

Southern Ry. Co. v. Greene, 216 U. S. 400, 418.

(c) Nor discriminate between domestic corporations.

Royster Guano Co. v. Virginia, 253 U. S. 412.

The statute, on its face, as well as by its application to appellee, discriminates against appellee and in favor of

other corporations, foreign and domestic, who are assessed and pay a franchise tax of 5 cents per $100 on that portion of their issued capital stock represented by property and business in Illinois.

Appellant will possibly contend the amount of issued stock bears a fair relation to value of the franchise, heretofore granted, to do business in Illinois and that the annual excise may be based thereon. This may be so. But the ratio of property owned and business annually done bears a more true relation to the value of the appellee's franchise, secured at the time of its admission, and the state discriminates against appellee by taxing some corporations on the one basis (the one having a real direct and more true relation to the value of the privilege) and taxing appellee a proportionately greater amount on a more remote, arbitrary and less true basis.

On its face, therefore, the statute is discriminatory because it fixed two "bases" for a franchise tax, which, when applied, assess taxes in different amounts, acting more favorably towards some corporations and less favorably towards others, including appellee.

Not only do the statutes on their face discriminate against appellee, but, in their application, appellee is discriminated against.

The Chancellor correctly outlines the basis of the discrimination when he says:

> "Plaintiff complains that it is discriminated against because another corporation with an issued capital

stock of $270,423.00, and having all of its property and business in Illinois, would be required to pay a tax of but $135.21, yet the State of Illinois insist upon plaintiff paying a sum of $1,000.00 for doing the same amount of business and having the same amount of property in the State of Illinois. It similarly complains because another corporation, with a capital stock of $1,000,000.00, and $270,423.00 of that capital represented in Illinois, would pay only $135.21, while plaintiff is required to pay $1,000.00" (Rec., p. 36).

The Chancellor then says that appellee is not discriminated against, in effect, because all corporations with the same issued stock as it, and, having the same property and business in Illinois as it, would pay the same tax: and that if appellee had issued stock in a smaller amount it would not be compelled to pay any greater tax than the smaller corporation (Rec., p. 36).

In effect, this amounts to saying: "It is true, the State discriminates against you, but you cannot complain, as the State also discriminates against every corporation which has a large issued capital and a small business in Illinois." This is not a sound answer to the charge. The fact that others are wronged does not make right the wrong done appellee.

To justify this statute, appellee, by reason of its large issued capital, must be in receipt **from the State of Illinois** of some actual and substantial privilege or advantage which other corporations, with smaller issued capital, but

with equal property and business and paying less or proportionately less, do not receive.

Is there any fair basis or justification for this discrimination?

Reasonableness of Classification.

All classifications for taxation, to be valid, must be on a reasonable, fair and nondiscriminatory basis, with a reasonable relation to the purpose for which the classification is made. Is there any fair reason for taxing a big corporation more on the privilege of doing the same amount of business than is exacted of a small corporation?

This difference of treatment cannot be justified as resulting from a proper classification.

> "It is unnecessary to say that the 'equal protection of the laws' required by the Fourteenth Amendment does not prevent the states from resorting to classification for the purposes of taaxtion. Numerous and familiar decisions of this Court establish that they have a wide range of discretion in that regard. But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. The latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemptions upon the grounds of policy" (Op. 415).
>
> "It is obvious that the ground of difference upon

which the discrimination is rested has no fair or substantial relation to the proper object sought to be accomplished by the legislation. It follows that it is arbitrary in effect, and none the less because it is probable that the unequal operation of the taxing system was due to inadvertence rather than design" (Op. 416).

Royster Guano Co. v. Virginia, 253 U. S. 412.

"It remains to consider the argument made on behalf of the State of Alabama, that the statute is justified as an exercise of the right of classification of the subjects of taxation, which has been held to be entirely consistent with the equal protection of the laws guaranteed by the Fourteenth Amendment. It is argued that the imposition of special taxes upon foreign corporations for the privilege of doing business within the state is sufficient to justify such different taxation, because the tax imposed is different, in that the one imposed on the domestic corporation is for the privilege of being a corporation, whereas the one on the foreign corporation is for the privilege of such corporation to do business within the state. While reasonable classification is permitted without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed, and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification."

Southern R. Co. v. Greene, 216 U. S. 415, Op. 417.

What benefit or privilege, desired or sought by appellee, does it receive from the State of Illinois which all other foreign corporations do not also receive?

Appellee's right to be a corporation with authority to issue a certain amount of capital stock, to engage in a certain business, and its invested powers, are all granted to it by Missouri, the state of its incorporation.

> "The state, which grants the franchise to be a corporation and authority to issue capital stock, may charge the corporation with an initial fee and an annual franchise tax upon the amount of the capital stock which it grants authority to issue, but it cannot charge a foreign corporation with such fee or tax for the privilege of transacting business within the state based upon its authorized capital. The authority of the foreign corporation to issue stock or the amount of stock it may have outstanding, does not depend upon the laws of Illinois, but upon the laws of the state in which it was organized."
>
> O'Gara Coal Co. v. Emmerson, 326 Ill. 18 (Op. 32).

The sole right which appellee sought from or received from the State of Illinois was to enter that state and do a local business.

At the time of its admission appellee received this right from the State of Illinois.

Section 80 of the Illinois statute requires foreign corporations, before transacting business in the state, to secure a "Certificate of Authority"—that is to be **admitted.** Sec-

tion 81 provides the form of application to the Secretary of State for such certificate, and on execution thereof the Secretary of State is advised of the proportion of its issued capital which the applicant expects to bring into Illinois. An initial or admission fee on the basis of the capital expected to be brought into Illinois and the first year's franchise tax is required to be paid. (See sections 101 and 129.)

When once admitted, we say the foreign corporation becomes a quasi-corporate citizen of Illinois, in substance, with an issued stock in the amount on which it has paid the admission tax. Each year the foreign corporations make an annual report (Sec. 106) disclosing the amount of its issued capital represented by property and business in the state during the preceding year, and if the corporation has brought more of its capital into the state than that on which it had previously paid admission fees, then an admission fee on the additional capital is charged.

After admission of a foreign corporation the state cannot impose an annual franchise tax, where the sole business conducted by the corporation within the confines of the state was in interstate commerce.

Ozark Pipe Line Corp. v. Monier, 266 U. S. 561, Op. 565;

Alpha Portland Cement Co. v. Mass., 268 U. S. 212, Op. 218.

Yet appellant says (Brief 7) the state may **assume** appellee will bring in sufficient of its capital stock to produce the minimum franchise tax provided in section 107. By what right or reason may the state so assume. If such were the fact, then section 107 would be without necessity or reason—for if, in fact, all corporations with big capitals would bring such proportions of their stock into the state, then section 107 would be without purpose. Furthermore, the annual report filed by appellee informed the state that there was not any basis for such assumption. Certainly the state cannot base a franchise tax on the assumption that the corporation will bring an additional part of its capital into the state before the corporation has applied for the admission of same, paying the additional admission fee, or actually brought such additional capital into the state; and in this particular instance the corporation is a railroad utility, which by the laws of the state cannot extend its line of railroad without a certificate of convenience and necessity first being granted by the Commerce Commission. (See Brief, p. 11, ante.)

It is pleaded in the bill of complaint that appellee is an interstate carrier by railroad, subject to and operating under the provisions of the Transportation Act (Rec., p. 3), and the Illinois Commerce Act. It cannot abandon its properties in Illinois and cease their operation without first obtaining a certificate of convenience and necessity from the Interstate Commerce Commission.

It cannot build or acquire other properties in Illinois

without first securing a certificate of convenience and necessity from the Interstate Commerce Commission. It operates a railroad property located in a number of states and must unavoidably have a large issued capital stock, only a portion of which it can employ in Illinois. We insist that as to all corporations, and particularly as to corporations in appellee's situation, the right to do a local business in Illinois has no value beyond the actual use thereof, which the recipient can or desires to make. To say that the State of Illinois may require such a foreign corporation to pay a franchise tax actually based on a greater part of its issued capital than is actually represented by property and business in the state, or on a greater proportion (than that represented by property and business) of its issued capital than it can or desires to bring into the state, or else pay a franchise tax based upon such portion of its capital falls flat of its own absurdity.

Appellant speaks of the State of Illinois granting "privileges each year in advance" (Brief 13). Such is not the actual effect and operation of the statute.

As pointed out in the statement (pp. 4, 5, ante), the tax in question is computed on appellee's annual report of property owned and business done in the calendar year 1926.

The tax is levied for the privilege of doing a local business during the year beginning July 1, 1927, and ending June 30, 1928.

Clearly, the, if during the calendar year of 1927 or dur-

ing the year July 1, 1927, to June 30, 1928, appellee should bring additional property and business into Illinois, it would have no relation to or in anywise be attributable to its payment of the tax here involved. Such subsequent importation of capital and business would only have effect by increasing its tax for the following years.

Although appellant does not refer to section 101 of the statute (in his printed brief), we anticipate the contention that it requires the payment of all subsequent franchise taxes as a condition of admission into Illinois. This section providing:

> "Each foreign corporation for pecuniary profit, other than an insurance company or building and loan company, in addition to the annual franchise fees and taxes hereinafter provided, shall pay to the Secretary of State for its certificate of authority to do business in Illinois the same fees provided by this act to be paid by a similar corporation incorporated under the laws of this state. Each foreign corporation heretofore or hereafter admitted to do business in this state shall also pay for increases in the amount of capital stock represented in Illinois, for extension of existence, consolidations, mergers and for filing amendments the same fees required to be paid by corporations organized under the laws of this state. All such fees shall be based upon the proportion of its issued capital stock represented by business transacted and property located in Illinois. Whenever it shall appear that the amount of capital stock represented in Illinois is greater than the amount theretofore paid by

> any foreign corporation, such corporation, before it shall continue to transact business in Illinois, shall pay to the Secretary of State upon such excess the same fees that a domestic corporation must pay upon an increase in capital stock equal to the amount of such excess."

We contend the requirement that a foreign corporation,

> "in addition to the annual franchise fees and taxes hereinafter provided, shall pay to the Secretary of State for its certificate of authority to do business in Illinois the same fees provided by this act to be paid by a similar corporation incorporated under the laws of this state,"

refers to franchise taxes for the first year or the balance of the first year following admittance. (See Section 129.)

This is indicated by section 92, which provides:

> "Sec. 92. The certificate of authority of a foreign corporation, subject to the provisions of this act, may be revoked by the Secretary of State:
>
> "6. Upon failure, neglect or refusal to file an annual report, as required by this act, or upon failure, neglect or refusal to pay the franchise tax assessed against it on or before the 31st day of July of the year in which such franchise tax becomes due and payable."

Furthermore, if the payment of all future excises levied against appellee, whether or not they violated constitu-

tional requirements, was, by reason of section 101, a condition of admission into Illinois, then we invoke the principle that a state may not, as a condition of admission, require a foreign corporation to submit to any such unconstitutional levy. This was settled by the case of Looney v. Crane, 245 U. S. 178.

> "The sole contention, then, upon which the acts can be sustained, is that, although they exerted a power which could not be called into play consistently with the Constitution of the United States, they were yet valid because they also exercised an intrinsically local power. But this view can only be sustained upon the assumption that the limitations of the Constitution of the United States are not paramount, but are subordinate to and may be set aside by state authority as the result of the exertion of a local power. In substance, therefore, the proposition must rest upon the theory that our dual system of government has no existence, because the exertion of the lawful powers of the one involves the negation or destruction of the rightful authority of the other. But original discussion is unnecessary, since to state the proposition is to demonstrate its want of foundation, and because the fundamental error upon which it rests has been conclusively established. Indeed, the cases referred to were concerned in various forms with the identical questions here involved, and authoritatively settled that the states are without power to use their lawful authority to exclude foreign corporations by directly burdening interstate commerce as a condition of permitting them to do business in the state, in violation of the Constitution, or, because of

> the right to exclude, to exert the power to tax the property of the corporation and its activities outside of and beyond the jurisdiction of the state, in disregard, not only of the commerce clause, but of the due-process clause of the Fourteenth Amendment" (pp. 187-188).

Appellant urges that the Illinois statutes are intended to impose only a reasonable minimum charge upon all corporations, both foreign and domestic, for maintaining the privilege granted of doing a local business in the state during the next ensuing year.

A "minimum charge" is often permitted to cover the cost of bookkeeping, collection of tax and the administration of the act. It is usually a nominal amount. It could not reasonably vary according to the issued capitals of the franchise taxpaying corporations. As indicated by section 107 of the statute, this minimum tax should not be over $10.00, that being the minimum amount payable by a corporation having a capital stock of less than $50,000.00.

The Franchise Tax Demanded of Appellee Has No Fair Relation to the Value of the Privilege Asked and Received by Appellee.

Any annual franchise or privilege tax (assuming it is not discriminatory), exacted of foreign corporations, must have a reasonable relationship to the value of the privilege granted. It must require like fees for equal privileges.

The equal protection of the laws requires that such franchise tax must have a fair relation to value of the privilege for which it is imposed. If it be arbitrary or lacks such reasonable relationship it is void.

In the Air-Way Electric case this Court said:

> "The fee determined by the lower court, as well as that fixed by the state officers, is arbitrary. Without holding that such a charge must be measured by the value of the privilege for which it is imposed, it may be said that some relation to such value is a reasonable requirement" (Op. 83).
>
> Air-Way Electric Appliance Co. v. Day, 266 U. S. 71.

The tax is **"not limited to the part of the capital stock justly apportioned to the taxing state."**

International Shoe Co. v. Shartel, 279 U. S. 434.

As applied to appellee and weighted by such a test, sections 105-107 of the Illinois statute require appellee to pay a franchise tax which has no fair and reasonable relation to the value of the privilege granted, and the tax is not limited to that part of appellee's capital justly apportioned to Illinois.

V.

General Railway Signal Co. v. Virginia, and Similar Cases, Distinguished.

Appellant cites the case of Baltic Mining Co. v. Mass., 231 U. S. 68, which involved a statute imposing an annua

excise of one-fiftieth of 1 per cent of corporation's authorized capital, with a maximum limit of $2,000.00 on corporations with an authorized capital of $10,000,000.00 or more. The tax was held not to fall upon the stock because of the fixed **maximum**, which limited the amount of the tax when, on the basis of one-fiftieth of 1 per cent, it might have been larger.

With reference to the Baltic case, this Court recently said:

> "It must now be regarded as settled that a state may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the commerce clause, and the Fourteenth Amendment does not permit taxation of property beyond the state's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 87, 58 L. ed. 127, 134, 34 Sup. Ct. Rep. 15, tends to support a different view, it conflicts with conclusions reached in later opinions, and is now definitely disapproved."
>
> Alpha Portland Cement Co. v. Massachusetts, 268 U. S., p. 218.

The appellant also relies on the case of General Railway Signal Company v. Virginia, 246 U. S. 500.

That case is clearly not applicable. It involved a different kind of tax, viz., an initial or admission tax, against

which the only contention made was that it unreasonably burdened interstate commerce. The State of Virginia apparently did not exact any annual franchise or license fees. The initial tax was payable at the time the foreign corporation was admitted. For lack of a more true and better basis for the tax, the Court sustained an admission tax based on a scale of fees not varying directly in proportion to the authorized capital stock of the corporations admitted, and which had a fixed **maximum** amount. The Court could not say it was a tax on the corporation's capital stock, which represented property and business in several states, as it did not vary in direct proportion to that stock, and a maximum tax was fixed, which there and in the case of Baltic Mining Co. v. Massachusetts, 231 U. S. 68, tended to keep down the amount of the tax which was paid by the contesting corporations. The maximum therein fixed was held to save the statute, as it limited or diminished the amount of the tax to a certain **maximum**. It is a very different thing in operation to section 107 of the Illinois statute, which acted to increase the tax by fixing a scale of **minimums**. This particular difference between the two types of statutes was pointed out by your Honors in the case of Looney v. Crane Co., supra, where, with reference to the limitation on the amount of the tax (by reason of which the tax was sustained in the Baltic Mining Company case), it was said:

> "In the second place, in making the inquiry stated in all of the cases, the compatibility of the statutes

with the Constitution, which was found to exist, resulted from particular provisions contained in each of them, which so qualified and restricted their operation, and necessarily their effect, as to lead to such result. A. These conditions related to the subject matter upon which the tax was levied, or to the amount of taxes in other respects paid by the corporations, or limitations on the amount of the tax authorized, when a much larger amount would have been due upon the basis upon which the tax was apparently levied.''

Looney v. Crane Co., 245 U. S. 178 (Op. 190).

The Illinois statute, therefore, does not possess the saving quality of the Massachusetts statute involved in the Baltic Mining Co. case, or the Virginia statute involved in the General Railway Signal Co. case. It acts directly opposite to the Massachusetts statute. The Massachusetts statute decreases or limits ''the amount of the tax authorized, when a much larger amount would have been due upon the basis upon which the tax was apparently levied,'' viz., one-fiftieth of 1 per cent of the corporation's capital (if one-fiftieth of 1 per cent amounted to more than $2,000.00, the tax was nevertheless limited to that sum). The Illinois statute increases ''the amount of the tax * * * which would have been due upon the basis upon which the tax was apparently levied,'' viz., one-twentieth of 1 per cent of that portion of the corporation's stock represented by its property and business in Illinois. If one-twentieth of 1 per cent did not amount to

the minimum fixed by section 107, the amount of the tax was raised to that minimum.

The case of Cheney Bros. v. Massachusetts, 246 U. S. 147, involved the same statute and the same principles as the Baltic case.

In those cases no question of discrimination voiding the tax under the equal-protection-of-the-laws clause was raised by the parties or considered by the Court.

In this connection the Court is familiar with the rule that questions (particularly constitutional questions), not specifically raised and urged, will not be considered or passed on by the Court.

> James W. Lusk, Receiver, v. Botkin, 240 U. S. 230;
> Chic. I. & L. Ry. v. Hatchett, 228 U. S. 559.

And persons not adversely affected by the particular operation of a statute, by reason of which its unconstitutionality is charged, cannot raise the point.

> Roberts & Schaeffer v. Emmerson, supra.

The Court's opinion in the General Railway Signal case states:

> "It seems proper, however, to add that this case is on the borderline" (Op., p. 511).

The Virginia statute did not provide a fee for some corporations, measured by their property and business in the

state, and a fee for others, measured by their issued capitalization, thereby discriminating between such two classes of corporations.

The General Railway Signal Company case holds only that an entrance fee of $1,000.00, exacted of a foreign corporation for privilege of doing a local business, standing alone, is not a direct tax on interstate commerce and was not, under the circumstances, so arbitrary as to amount to an unreasonable burden on interstate commerce.

The cases of Kansas City, Ft. S. & M. Ry. Co. v. Kansas, 240 U. S. 227; K. City, M. & B. R. R. v. Stiles, 242 U. S. 111; Roberts & Schaeffer Co. v. Emmerson, 271 U. S. 50, are clearly distinguishable on the grounds that the complaining corporations were **domestic corporations**, which received from the taxing states the right (among others) to be a corporation.

> "Examining the statute in the present case, we see no reason to doubt the accuracy of the description of the tax by the state court. We take it to be simply a tax on the privilege of being a corporation—on the primary corporate franchise granted by the state. The authority of the state to tax this privilege, or franchise, has always been recognized, and it is well settled that a tax of this sort is not necessarily rendered invalid because it is measured by capital stock which in part may represent property not subject to the state's taxing power."
>
> Kansas City, Ft. S. & M. Ry. v. Kansas, 240 U. S. 230 (Op., p. 232).

"The tax is not of the character condemned in Western Union Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. Ed. 355, 30 Sup. Ct. Rep. 190, and kindred cases. In the latter case a tax of large amount was imposed upon a foreign corporation engaged in interstate commerce for the privilege of doing local business within the state. Under the circumstances therein disclosed and the character of the business involved, this Court held that the statute was, in substance, an attempt to tax the right to do interstate business, and to tax property beyond the confines of the state, and was therefore void. Here a franchise tax is levied upon a corporation consolidated under the laws of the state by its own acceptance of that law in incorporating under it."

Kansas City, M. & B. R. Co. v. Stiles, 242 U. S. 111 (Op., p. 118).

The case of Hump Hairpin Mfg. Co. v. Emmerson, 258 U. S. 290, involved only the question of the manner of computing the proportion of the foreign corporation's stock represented by property and business in Illinois; the Court holding that the aggregate amount of interstate sales effected from the company's place of business in Illinois was properly included as business done in Illinois; such inclusion affecting interstate commerce only incidentally and indirectly, saying:

"Taxes have been so repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements in the process of determining the amount of a fund (not wholly derived from such commerce) to be assessed" (Op., p. 294).

In that case the Illinois statute was not attacked on the same grounds as was the Ohio statute in the case of Air-Way Elec. Co. v. Day, viz., that a tax on part of the corporation's unissued stock acted to deprive it of the equal protection of the law, etc. If the question had been raised, then, in view of the subsequent action of the Court in the Air-Way case, a different result would have been reached. The Supreme Court of Illinois, after sustaining this statute in

> American Can Co. v. Emmerson, 288 Ill. 297;
> Hump Hairpin Co. v. Emmerson, 293 Ill. 389;
> Armstrong v. Emmerson, 300 Ill. 54;

later, when the equal-protection-of-the-laws objection was called to its attention, held the statute to be invalid.

> O'Gara Coal Co. v. Emmerson, supra.

This most aptly illustrates appellant's error in calling attention to a certain statute, and then stating that the Court sustained the statute, without setting forth the specific questions raised and considered by the Court.

The case of Hump Hairpin Co. v. Emmerson is similar on principle to three other cases cited by appellant, namely:

> Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113;
> U. S. Glue Co. v. Oak Creek, 247 U. S. 321;
> Peck v. Lowe, 247 U. S. 165,

which hold only that an income tax, levied on the **net** income of a foregin corporation earned within the state (a part being earnings on interstate commerce), is not a direct or (in those cases) an unreasonable burden on interstate commerce. An income tax on the **gross** income earned by such corporation in interstate commerce, would be a direct burden, and hence void.

In Postal Tel. Co. v. Adams, 155 U. S. 688, cited by appellant, this Court held that, in lieu of property taxes on telegraph lines, a state could exact the equivalent thereof in the form of a franchise tax.

VI.

The United States Circuit Court of Appeals Did Not Misconceive the Nature and Effect of the Tax.

On page 21 of his brief, appellant quotes an excerpt from the opinion of the Circuit Court of Appeals in this case. This excerpt was contained in the opinion before rehearing; after rehearing, the following was substituted:

> "In short, it offered to pay 5 cents on each $100.00 of that part of its capital stock which was ascertained by applying said section 105."
>
> See the opinion as published in 30 Fed. Rep. (2d Series) 322, at 323.

That the Court correctly understood the nature and effect of the tax, is clearly indicated by the whole of the opinion.

Furthermore, the judgment, not the reasoning of the Court, is a matter here for review.

VII.

For the foregoing reasons, appellee respectfully insists that the judgment of the Circuit Court of Appeals for the Seventh Circuit, reversing the judgment of the United States District Court for the Southern District of Illinois, should be affirmed.

Respectfully submitted,

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APPENDIX.

All references are to

Chapter 32, Cahill's Revised Statutes 1927;
Chapter 32, Smith-Hurd Revised Statutes 1927.
Section numbers are identical in both volumes.

Sec. 80. **Certificate of Authority to Do Business—Requirement as to Payment of Capital Stock.**—Each foreign corporation organized for pecuniary profit (except banking, insurance, building and loan and surety companies), not now licensed to do business in this state, shall, before it transacts any business or maintains an office in this state, procure a certificate of authority therefor from the Secretary of State. No certificate shall issue to any foreign corporation authorizing it to transact business in this state until the same amount is paid on each share of stock issued or to be issued as is required of like corporations organized under the laws of this state.

As amended by L. 1927, p. 354, approved and in force May 12, 1927.

Sec. 81. **Filing Application With Secretary of State—Contents.**—A foreign corporation desiring a certificate of authority hereunder shall file in the office of the Secretary of State:

(1) A copy of its charter duly authenticated by the proper officer of the state or country where it is incorporated;

(2) A statement verified by its president and secretary or other officer setting forth:

(a) The name of such corporation and the location of its principal office or place of business without this state,

and the location of the proposed principal office or place of business in this state;

(b) The names of the states in which it has qualified to do business under the corporation laws thereof;

(c) The character of business which it intends to carry on in this state;

(d) An itemized estimate of the amount of tangible property to be employed by it in the state during the first year next after the date on which it shall be licensed and begin to do business in this state;

(e) An estimate of the total amount of the capital to be employed by it in this state and an estimate of the total amount of capital to be employed by it elsewhere during such year, itemized as follows:

(1) The value of patent rights, licenses, franchises, trade-marks, secret processes, copyrights and good will.....$.....

(2) Contracts or choses in action.....$.....

(3) Merchandise, raw materials and goods in process of manufacture.....$.....

(4) Book accounts and notes.....$.....

(5) Machinery and real estate.....$.....

(6) Stock in other corporations and securities.....$.....

(7) Furniture, fixtures, stationery and like articles.....$.....

(8) Cash in bank.....$.....

(9) Kinds and amount of other personality (personalty).....$.....

(f) An estimate of the annual business to be transacted by the corporation everywhere;

(g) An estimate of the annual business to be transacted at or from places of business in Illinois;

(h) The name and address of some person permanently residing in this state, upon whom, as the resident agent of the corporation until his successor shall have been appointed, service of legal process may be had, and the names and addresses of the officers and directors;

(i) Such other information touching the property and business of the corporation as the Secretary of State may require;

In the case of telegraph, telephone, cable, railroad or pipe line corporations, in addition to the itemized estimate of the total amount of capital to be employed in this state, there shall be given the total length of such telephone, telegraph, cable, railroad or pipe line, and the length of the line located in this state and the total value of such line and the value of such line in this state.

Sec. 92. **Revocation of Certificate of Authority to Do Business—Grounds.**—The certificate of authority of a foreign corporation, subject to the provisions of this act, may be revoked by the Secretary of State:

(1) Upon failure of an officer, director or manager, to whom interrogatories are propounded, to answer the same fully and to file such answer in the office of the Secretary of State within thirty days after the mailing of the same;

(2) If such corporation is transacting no business in Illinois and has no tangible property in this state;

(3) If the answer to interrogatories propounded by the Secretary of State discloses, or if the fact is otherwise ascertained, that the proportion of the capital stock of such corporation represented in this state is greater than the amount theretofore paid upon by such corporation and the deficiency in such fees is not paid within thirty days

of the receipt of a notice sent by mail to the president and secretary, or to the statutory agent of such corporation of record in this state, or to the attorney filing the interrogatories for such corporation, or is not paid within such extension of time as may be granted by the Secretary of State;

(4) Upon failure of such corporation to keep on file in the office of the Secretary of State duly authenticated copies of each instrument amending its charter;

(5) Upon failure of such foreign corporation to appoint and maintain an agent in this state upon whom service of legal process may be had;

(6) Upon failure, neglect or refusal to file an annual report as required by this act, or upon failure, neglect or refusal to pay the franchise tax assessed against it on or before the thirty-first day of July of the year in which such franchise tax becomes due and payable;

(7) Upon failure, neglect or refusal to file a certificate of issuance of stock and the payment of the fees required by this act.

As amended by L. 1927, p. 354, approved and in force May 12, 1927.

Sec. 94. **Unlicensed Foreign Corporation Doing Business in State—Actions and Suits by—Penalties—Recovery.**—No foreign corporation doing business in this state without a license shall be permitted to maintain any suit at law or in equity in any of the courts of this state upon any demand, whether arising out of contract or tort; and all such corporations shall be liable by reason thereof to a penalty therefor of not less than two hundred and fifty dollars nor more than one thousand dollars, to be recovered in any court of competent jurisdiction, in a civil action to be begun and prosecuted by the Attorney-General.

Sec. 96. **Incorporation Fee—Increase of Capital—No-par-value Stock, Basis of Fee—Public Utility Corporations.**—The Secretary of State shall charge and collect an initial fee of one-twentieth of one percentum upon the amount of the capital stock which the corporation, has issued or it proposes to issue at once, but in no case shall such fee be less than twenty dollars, and a like fee of one-twentieth of one percentum upon filing a certificate of any subsequent issue or increase of capital stock and, in addition thereto, the same fee as that required for filing other certificates of amendment. In the event that the corporation has capital stock of no-par value, its shares, for the purpose of fixing the fee, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares. Each public utility corporation, including railroads, shall pay to the Secretary of State the same fees as are required to be paid for incorporation by other corporations organized for pecuniary profit.

As amended by L. 1927, p. 354, approved and in force May 12, 1927.

Sec. 101. **Foreign Corporations—Fees for Certificate of Authority—On Increase of Stock—On Extensions, Consolidations, Mergers, Amendments—Basis of Fees—Where Capital Stock Without Par Value.**—Each foreign corporation for pecuniary profit, other than an insurance company or building and loan company, in addition to the annual franchise fees and taxes hereinafter provided, shall pay to the Secretary of State for its certificate of authority to do business in Illinois, the same fees provided by this act to be paid by a similar corporation incorporated under the laws of this state. Each foreign corporation heretofore or hereafter admitted to do business in this state, shall

also pay for increases in the amount of capital stock represented in Illinois, for extensions of existence, consolidations, mergers and for filing amendments the same fees required to be paid by corporations organized under the laws of this state. All such fees shall be based upon the proportion of its issued capital stock represented by business transacted and property located in Illinois. Whenever it shall appear that the amount of capital stock represented in Illinois is greater than the amount theretofore paid upon by any foreign corporation, such corporation, before it shall continue to transact business in Illinois, shall pay to the Secretary of State upon such excess the same fees that a domestic corporation must pay upon an increase in capital stock equal to the amount of such excess.

If a foreign corporation has a capital stock of no-par value, its shares, for the purpose of estimating the amount of fees and taxes to be paid hereunder, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares.

As amended by L. 1927, p. 354, approved and in force May 12, 1927.

Sec. 102. **Annual Reports—What Corporations Required to Make—Time for Making—Contents—Verification—Publication of List of Reporting Corporations—Copy to Recorder of Deeds.**—Each corporation, including railroads, domestic and foreign, other than homestead associations, building and loan association[s], banks, religious corporations, insurance companies, and corporations not for pecuniary profit, shall make a report in writing to the Secretary of State between the first day of February and

the first day of March of each year on forms to be prescribed and furnished by the Secretary of State. That part of the annual report relating to property and business shall be made as for the calendar year ending December thirty-first preceding (except in case the corporation keeps its accounts on the basis of a fiscal year not identically with the calendar year it shall make report for the fiscal year next preceding February first of the year in which such report is made. The other information required in such report shall be given as of the date of execution of such report. In case the corporation has not been in existence a year it shall furnish the Secretary of State the information required for the period since it was incorporated or admitted. Such report shall give the address of the corporation, officers and directors in this state by street and number. Such annual report shall also disclose such facts as are necessary to enable the Secretary of State to ascertain the proportion of its capital stock represented by business transacted and tangible property located in this state, and such other information as may be necessary or appropriate in order to assess the annual license fee or franchise tax. Such report shall be verified by the oath of the president, vice-president, secretary, assistant secretary or treasurer of the corporation, but in case the corporation is in the hands of an assignee, receiver or trustee then such report shall be signed and verified by such assignee, receiver or trustee.

The Secretary of State shall on or before the 15th day of January of each year forward to each corporation of record in his office a copy of the forms to be used in making the report specified in this act, but the failure to send or to receive such forms shall not relieve the corporation from the duty of making such report.

The Secretary of State shall publish on or before Sep-

tember first of each year a list of corporations filing an annual report in accordance with the provisions of this act, with the names and addresses of the president and secretary of domestic corporations or the agent for service of legal process of foreign corporations, and shall furnish a copy thereof to each Recorder of Deeds.

Sec. 105. **Annual License Fee or Franchise Tax—Amount —Minimum—No-par-value Stock.**—Each corporation for profit, including railroads, except insurance companies, heretofore or hereafter organized under the laws of this state or admitted to do business in this state, and required by the act to make an annual report, shall pay an annual license fee or franchise tax to the Secretary of State of five cents on each one hundred dollars of the proportion of its issued capital stock, or amount to be issued at once, represented by business transacted and property located in this state, but in no event shall the amount of such license fee or franchise tax be less than that required by this act of corporations having no property or business in this state.

In the event that the corporation has stock of no-par value, its shares, for the purpose of fixing such fee, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares.

As amended, L. 1927, p. 354, approved and in force May 12, 1927.

The 1927 amendment carried an emergency clause, as follows:

Sec. 2. Whereas, the Supreme Court of this state has held that certain sections of the General Corporation Act, which based the fees on the authorized capi-

tal stock, are unconstitutional as to foreign corporations;

Whereas, under the decision of the Supreme Court the Secretary of State will not be able to collect the fees from corporations to which the state is entitled and, further, that all of the annual franchise tax provisions of said act are in danger of being invalidated unless said sections are amended, and,

Whereas, the Secretary of State is, under the provisions of section 112 of the aforesaid act, obliged to mail notice between the first day of February and the fifteenth day of May, in writing, to each corporation against which a franchise tax or fee is assessed, notifying such corporation of the amount of franchise tax or fee assessed against it for the year next ensuing, commencing on July first, and,

Whereas, unless this act becomes effective on or before May fifteenth the state will lose the fees from corporations to which the state is justly entitled;

Therefore, an emergency exists and this act shall take effect and be in full force from and after its passage.

L. 1927, pp. 359-60.

Sec. 106. **Ascertainment of License Fee or Franchise Tax in Case of Corporations Generally.**—In ascertaining the amount of the issued capital stock represented by business transacted and property located in this state, the sum of the business of any foreign or domestic corporation transacted in this state and the total property of such corporation located within this state shall be divided by the sum of the total business of the corporation and the total property of the corporation wherever situated.

As amended by L. 1927, p. 354, approved and in force May 12, 1927.

Sec. 107. —— **Basis in Case of Corporation Without Property in State and Doing No Business in State—Where Stock of No-par Value.**—In case it appears from the annual report that the corporation has no property located in this state, and is transacting no business in this state, the following fees shall be paid annually to the Secretary of State as an annual franchise tax: All such corporations having issued capital stock of $50,000 or less shall pay an annual fee of $10; corporations having issued capital stock of more than $50,000, but not exceeding $200,000, shall pay an annual fee of $15; corporations having issued capital stock of more than $200,000, but not exceeding $500,000, shall pay an annual fee of $20; corporations having issued capital stock of more than $500,000, but not exceeding $1,000,000, shall pay a fee of $50; corporations having issued capital stock of more than $1,000,000, but not exceeding $10,000,000, shall pay a fee of $200; corporations having issued capital stock of more than $10,000,000, but not exceeding $20,000,000, shall pay a fee of $500; and all corporations having issued capital stock in excess of $20,000,000 shall pay an annual fee of $1,000.

In the event that the corporation has stock of no-par value, its shares, for the purpose of fixing such fee, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares.

As amended by L. 1927, p. 354, approved and in force May 12, 1927.

Sec. 108. **When Franchise Tax Payable.**—The franchise tax herein provided to be paid shall be due and payable on the first day of July of each year and shall be the franchise tax for the year commencing on the first day of

July in which it is due and ending on the thirtieth day of June next thereafter.

Sec. 109. **Assessment of Tax From Annual Report—Corporations Organized Between January 15 and March 1.**—The Secretary of State shall, from the annual report filed, assess a tax at the rates herein prescribed against each corporation required herein to make an annual report.

The Secretary of State shall, from the best available information, also assess such tax on all corporations organized or admitted between the fifteenth day of January and the first day of March.

Sec. 112. **Notice of Amount of Franchise Tax—Contents —Failure to Receive.**—Between the first day of February and the fifteenth day of June, of each year, the Secretary of State shall mail a notice in writing to each corporation against which a tax is assessed, notifying such corporation of the amount of the franchise tax assessed against it for the year next ensuing, commencing on July first, and the amount found by the Secretary of State to be due upon an increase of capital stock of a foreign corporation represented in this state, and that objections, if any, to such assessment will be heard by the officer making such assessments, upon request by corporation on a day not later than the twenty-fifth day of June, provided upon proper showing to the Secretary of State that the failure to request a hearing before that date was due to the absence or sickness on the part of some officer of the corporation, the Secretary of State may grant a hearing after that date. Such notice shall further state that the tax herein assessed is payable to the officer making the assessment on July first after the date of the notice. The notice required by this section shall be mailed to the cor-

poration addressed to its post-office address, as shown by the records in the office of the Secretary of State. A failure to receive the notice mentioned in this section shall not relieve a corporation of the obligation to pay the annual franchise taxes nor shall it invalidate the assessment of the tax.

As amended by L. 1927, p. 354, approved and in force May 12, 1927.

Sec. 113. **Collection of Assessment.**—It shall be the duty of the officer making the assessment to collect the same.

Sec. 114. **Delinquent Corporations—Penalty.**—If the franchise tax assessed in accordance with the provisions of this act shall not be paid on or before the thirty-first day of July, it shall be deemed to be delinquent, and there shall be added a penalty of five per cent for each month or part of month that the same is delinquent, commencing with the month of August.

Sec. 115. **Franchise Taxes and Penalties a Prior Lien—Record of Taxes, Penalties and Costs.**—The franchise taxes assessed under this act, together with penalties, interest and costs that shall accrue thereon, shall be a prior and first lien on the real and personal property of the corporation from and including the first day of July of the year when such franchise taxes should have been paid until the same have been paid.

The Secretary of State shall make and keep in his office a record showing the name of each corporation against which a franchise tax has been assessed, the amount assessed against each corporation, together with penalties and costs, if any, and the date when paid, and a notation of any and all proceedings taken for the collection of the franchise tax.

Sec. 116. **Collection of Delinquent Franchise Taxes and Penalties—Procedure.**—In case any corporation shall fail, refuse or neglect to pay the franchise tax assessed against it on or before the thirty-first day of July, the Secretary of State shall issue a warrant, under his hand and official seal, directed to the Sheriff of any county in the state, commanding him to collect and return such franchise tax and penalties. It shall be the duty of the Sheriff receiving such warrant to levy upon and sell the personal property of such corporation to satisfy such franchise tax and penalties, together with the legal costs and charges of such Sheriff. Upon the receipt of such warrant the Sheriff shall proceed upon the same in all respects, with like effect, and in the same manner as prescribed by law in respect to executions issued against property upon judgments of courts of record, and shall be entitled to the same fees for the execution of the warrant, to be collected in the same manner. After proceeding in the manner prescribed, the Sheriff shall make the proper and necessary notations, of the amounts collected, upon the warrant and promptly return it to the Secretary of State within ninety days from the date of issuance thereof, with the amount of franchise tax and penalties collected by him, if any.

Sec. 128. **Payment of Franchise Tax and Fees as Condition to Doing Business or Maintaining Suits.**—No corporation required to pay a franchise tax or fee under the laws of this state shall transact any business in this state or maintain any action at law or suit in equity, unless such corporation shall have paid such franchise tax, or such fees and penalties when the same become due and payable until such franchise taxes, fees and penalties have been paid in full.

Sec. 129. **Annual Franchise Taxes.**—In addition to all other fees required by law to be paid, the Secretary of State shall collect in advance from corporations subject to a franchise tax, annual franchise taxes as follows:

(1) If a corporation is organized, or admitted to do business in this state, or its capital stock issued or increased;

(a) Between July first of any year (after the year 1919), and September thirtieth of the same year a franchise tax equal to the full amount of the annual franchise tax;

(b) Between October first of any year (after the year 1919) and December thirty-first of the same year a franchise tax equal to three-fourths of the annual franchise tax;

(c) Between January first of any year and the last day of February of the same year, a franchise tax equal to one-half of the annual franchise tax;

(d) Between March first of any year and June thirtieth of the same year, a franchise tax equal to one and one-third of the annual franchise tax.

The franchise tax required by paragraphs "a," "b" and "c" shall be for authority of the corporation to carry on its corporate business until the thirtieth day of June following the date of payment of such tax. The franchise tax required by paragraph "d" of existing corporations increasing their capital stock shall be for authority of the corporation to employ its increased capitalization in this state until the thirtieth day of the second June following, but such corporation shall still be liable to pay its annual franchise tax upon its old capital stock in July following in the same manner as required of other corporations not increasing their capital stock. The fees required in this section shall be based upon the percentum of issued capital stock as evidenced by latest annual re-

port required to be filed under the provisions of this act, if any.

The word "between," as used in this section, shall include both dates specified.

As amended by L. 1927, p. 354, approved and in force May 12, 1927.

Sec. 130. **In Addition to Other Licenses or Taxes.** —The annual franchise taxes imposed by this act shall be in addition to any specific licenses or taxes imposed by law upon such corporation for the privilege of carrying on its business, or upon its franchise or property.

SUPREME COURT OF THE UNITED STATES.

No. 6.—October Term, 1930.

William J. Stratton, Secretary of State of the State of Illinois, Appellant, *vs.* St. Louis Southwestern Railway Company.	Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

[November 24, 1930.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This suit was brought on July 21, 1927, by St. Louis Southwestern Railway Company to restrain the enforcement of a statute of the State of Illinois (General Corporation Act, section 107), providing for the payment of a minimum franchise tax, upon the ground that the statute as applied to the complainant violated the commerce clause, and the due process and equal protection clauses, of the Federal Constitution. The bill of complaint prayed for both a preliminary and a permanent injunction against the defendant, Secretary of State of Illinois, from instituting any proceedings to assess the tax or to enforce any of the prohibitions or penalties prescribed in case of refusal to pay.

On July 22, 1927, the complainant made a motion for a temporary restraining order in accordance with the prayer of the bill. On the same day, District Judge FitzHenry entered an order enjoining the defendant from revoking the complainant's certificate of authority, from hindering the complainant in transacting its business in the State of Illinois, and from taking any steps for the enforcement of penalties, pending the determination of the application for an interlocutory injunction. While this order was in force, the defendant, on November 4, 1927, moved to dismiss the bill for want of equity. This motion was heard and granted by District Judge FitzHenry, sitting alone, and on June 7, 1928, he entered a decree dismissing the bill and dissolving the restraining order. 27 Fed. (2d) 1005.

On an appeal by the complainant from this decree, the Circuit Court of Appeals, holding the statute, which laid the tax, to be invalid under the Federal Constitution, reversed the decree and remanded the cause with directions to enter a decree in accordance with the views expressed in its opinion. 30 Fed. (2d) 322. A petition for a rehearing was denied, and from the decree of the Circuit Court of Appeals the present appeal is taken.

The question is thus necessarily presented, although not raised by the parties, with respect to the validity of the decree entered in the District Court, and the jurisdiction of the Circuit Court of Appeals to entertain the appeal from that decree, in the light of section 266 of the Judicial Code, as amended (U. S. C., Tit. 28. sec. 380). The statute provides that no interlocutory injunction, restraining the action of any officer of a State in the enforcement of a statute of the State, or of an order made by an administrative board or commission pursuant to a state statute, shall be granted by any Justice of the Supreme Court of the United States, or by any District Court, or by any Judge thereof, or by any Circuit Judge acting as District Judge, upon the ground of the unconstitutionality of the statute, unless the application for the injunction shall be heard and determined by three judges. When the application for such an injunction is presented to a justice or judge, he must immediately call to his assistance two other judges, as stated, but if he is of opinion that irreparable loss may otherwise result to the complainant, he may grant a temporary restraining order which is to remain in force only until the hearing and determination of the application for an interlocutory injunction upon prescribed notice. An appeal may be taken to this Court from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. By the amendment of February 13, 1925 (43 Stat. 938), the provision with respect to the presence of three judges was made to apply also to the final hearing in such suit in the District Court and from the final decree, granting or denying a permanent injunction, a direct appeal lies to this Court.

The decisions of this Court require the following conclusions as to the purpose and effect of the statute.

First. By the statute in its original form, the Congress sought to make interference by interlocutory injunction with the enforcement of state legislation a matter for the adequate hearing and full

deliberation which the presence of a court composed of three judges, as provided by the statute, was likely to secure. *Cumberland Telephone & Telegraph Company* v. *Public Service Commission*, 260 U. S. 212, 216. The gravity of this class of cases was recognized and it was sought to minimize the delay incident to a review upon appeal from an order granting or denying an interlocutory injunction. *Chicago Great Western Railway Company* v. *Kendall*, 266 U. S. 94, 97; *Moore* v. *Fidelity & Deposit Company*, 272 U. S. 317, 321; *Ex parte Collins*, 277 U. S. 565, 567. These purposes were not altered by the amendment of the statute, which was designed to end the anomalous situation in which a single judge might reconsider and decide questions already passed upon by three judges on the application for an interlocutory injunction. *Patterson* v. *Mobile Gas Company*, 271 U. S. 131, 136; *Smith* v. *Wilson*, 273 U. S. 388, 390, 391.

Second. The statute applies only where there is a substantial claim of invalidity under the Federal Constitution and where an application for an interlocutory injunction, for the purposes contemplated by the statute, is made and pressed. *Ex parte Buder*, 271 U. S. 461, 463, 467; *Ex parte Hobbs*, 280 U. S. 168, 172. The complainant has an election. If an interlocutory injunction is not sought, a single judge may hear and determine the case, and an appeal from the final decree will lie to the Circuit Court of Appeals. Judicial Code, section 128, U. S. C., Tit. 28, sec. 225; *Ex parte Buder, supra; Moore* v. *Fidelity & Deposit Company, supra; Smith v. Wilson, supra.*

Third. If an application for an interlocutory injunction is made and pressed to restrain the enforcement of a state statute, or of an administrative order made pursuant to a state statute, upon the ground that such enforcement would be in violation of the Federal Constitution, a single judge has no jurisdiction to entertain a motion to dismiss the bill on the merits. He is as much without power to dismiss the bill on the merits, as he would be to grant either an interlocutory or a permanent injunction. His authority is strictly limited to granting, upon proper cause being shown, a temporary restraining order to be effective only pending the determination of the application for an interlocutory injunction. Upon making such an order, it is his duty immediately to call two other judges, as the statute directs, to assist him in hearing and deter-

mining that application. *Ex parte Northern Pacific Railway Company,* 280 U. S. 142, 144.

Fourth. If a single judge, thus acting without jurisdiction, undertakes to enter an order granting an interlocutory injunction or a final decree, either dismissing the bill on the merits or granting a permanent injunction, no appeal lies from such an order or decree to this Court, as the statute plainly contemplates such a direct appeal only in the case of an order or decree entered by a court composed of three judges in accordance with the statutory requirement. Nor does an appeal lie to the Circuit Court of Appeals from an order or decree thus entered by a District Judge without authority, for to sustain a review upon such an appeal would defeat the purpose of the statute by substituting a decree by a single judge and an appeal to the Circuit Court of Appeals for a decree by three judges and a direct appeal to this Court.

Accordingly, where a court of three judges should have been convened, and was not, this Court may issue a writ of mandamus to vacate the order or decree entered by the District Judge and directing him, or such other judge as may entertain the proceeding, to call to his aid two other judges for the hearing and determination of the application for an interlocutory injunction. *Ex parte Metropolitan Water Company,* 220 U. S. 539; *Ex parte Northern Pacific Railway Company, supra.** This remedy would not be available if there were a remedy by appeal. *Ex parte Harding,* 219 U. S. 363; *Ex parte Metropolitan Water Company, supra; Ex parte Park Square Automobile Station,* 244 U. S. 412, 415; *Ex parte Slater,* 246 U. S. 128; *Ex parte Tiffany,* 252 U. S. 32, 37; *Ex parte Riddle,* 255 U. S. 450; *Maryland v. Soper (No. 1),* 270 U. S. 9.

Fifth. It follows that, in the present case, no appeal lay to the Circuit Court of Appeals, and that court should have dismissed the appeal for want of jurisdiction. The bill prayed for a preliminary, as well as for a permanent, injunction. On filing the bill

*The Act of October 22, 1913, c. 32, 38 Stat. 208, 220, U. S. C., Tit. 28, sec. 47, and section 266 of the Judicial Code, U. S. C., Tit. 28, sec. 380, are *in pari materia* (Virginian Railway Co. *v.* United States, 272 U. S. 658, 671, 672), and this Court may also issue a writ of mandamus to the District Judge to require the performance of the statutory duty under the former Act. Ex parte Atlantic Coast Line R. Co., 279 U. S. 822.

the complainant at once moved for a temporary restraining order in accordance with the prayer of the bill. The order granted by the District Judge recited that the complainant sought a temporary restraining order pending a hearing on an application for an interlocutory or preliminary injunction, and the order enjoined the enforcement of a state statute until the consideration and determination of that application. The application to restrain the enforcement of the state statute pending the suit, was manifestly not withdrawn but was continuously pressed in order to avoid the prohibitions and penalties imposed by the state law in case the tax in question was not paid. The District Judge, on granting the temporary restraining, order, failed to call in two other judges to aid him in hearing and determining the application for the interlocutory injunction, and the restraining order was permitted to operate as an interlocutory injunction for several months and until the determination of the motion to dismiss the bill on the merits.

The requirement of the statute has regard to substance and not to form. It matters not whether the injunction is called preliminary or interlocutory, or is styled a temporary restraining order, if it is granted to restrain the enforcement of state legislation and is continued in force until the hearing on the merits, without such restraint pending the suit being made the subject of consideration and determination by three judges as the statute requires. The temporary restraining order which the District Judge, acting alone, could grant is only to maintain the *status quo,* on proper cause being shown, for such time as may be necessary to obtain a decision upon the application for an interlocutory injunction by a court of three judges, which is to be immediately convened.

As the proceeding in this suit fell within the provision of the statute and the District Judge had no jurisdiction to hear the motion to dismiss the bill on the merits, the consent of the parties could not give validity to the decree or confer jurisdiction upon the Circuit Court of Appeals to entertain an appeal therefrom. *United States* v. *Emholt,* 105 U. S. 414, 416; *Parker* v. *Ormsby,* 141 U. S. 81, 86; *Perez* v. *Fernandez,* 202 U. S. 80, 100; *443 Cans of Egg Product,* 226 U. S. 172, 184; *Exporters* v. *Butterworth-Judson Company,* 258 U. S. 365, 369.

The remedy by mandamus to vacate the decree and to require the District Judge to call to his assistance two other judges, as

directed by the statute, to hear the application for an interlocutory injunction, is still available. It is not necessary, however, that formal application should be made for such a writ, as the District Judge may now proceed to take the action which the writ, if issued, would require.

When it appears, on an appeal to this Court from a decree of the Circuit Court of Appeals, that the latter court has acted without jurisdiction in entertaining the appeal from the District Court, the appropriate action of this Court is to reverse the decree of the Circuit Court of Appeals and to remand the case with directions to dismiss the appeal to that court for want of jurisdiction. *Union & Planters' Bank* v. *Memphis,* 189 U. S. 71, 73-74; *443 Cans of Egg Product* v. *United States, supra; Carolina Glass Company* v. *South Carolina,* 240 U. S. 305, 318; *City of New York* v. *Consolidated Gas Company,* 253 U. S. 219, 221; *The Carlo Poma,* 255 U. S. 219, 221.

Decree reversed and cause remanded to the Circuit Court of Appeals with directions to dismiss the appeal to that court for want of jurisdiction.

A true copy.

Test:

Clerk, Supreme Court, U. S.